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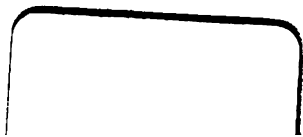
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Iowa University Law Review

THE

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OF

THE STATE UNIVERSITY OF IOWA

FOR THE USE OF STUDENTS

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THE LAW BULLETIN

OF

THE STATE UNIVERSITY OF IOWA.

NUMBER ONE.

HYPOTHETICAL CASES ON CONTRACTS.

[If a paragraph does not contain a question, it is to be understood that the question is whether the facts disclose a cause of action. If the facts are too scanty, the student should imagine additional facts, and, if possible, several groups of facts leading to varying results. In every instance the reasoning upon which the conclusion rests should be pointed out. As far as possible, authorities should be cited. In giving reasons it is well to avoid the words "implied," "executed," and "executory." *Quasi-contractual obligations should be distinguished from contracts*]

C 1. X makes Y an offer. Y writes to Z, "I accept that offer of X's." Is there an agreement?

H 2. A publisher informs me by a printed notice that, unless I direct otherwise, he will send me his newspaper and will require me to pay for it as a regular subscriber. I say nothing. He sends the newspaper. Must I pay for it?

3. X writes to Y, "I offer you my property, No. 76 Clinton St., for \$1,000, and this offer will remain open for ten days." Y answers, "I will give you \$500 for the west half." X refuses. Y then, within the ten days, goes to X, hands him a written acceptance of the \$1,000 offer, and tenders him \$1,000. X thereupon says he he has changed his mind. Is there a contract? (See *Maclay v. Harvey*, 90 Ill., 525; *Minneapolis, etc., Ry. Co. v. Mill Co.*, 119 U. S., 149.)

4. X makes an offer to Y and receives from Y \$50 in return for a promise to keep the offer open for ten days. Two days later X revokes the offer. Afterwards, but within the ten days, Y accepts the offer. Does this acceptance make a contract?

5. X writes to Y, "If you will deposit \$1,000 to my credit in the First National Bank of your city I will send you 1,000 copies of my history." Immediately upon receiving this letter Y deposits \$1,000 as suggested. Meanwhile X has died. Is there a contract?

6. In the case just now stated is it important that Y knows nothing of X's death?

7. In the same case alter the facts by supposing that X dies after the payment is made, but before Y has mailed a letter informing X of the deposit.

8. In the same case alter the facts by supposing that X became insane.

9. In the same case alter the facts by supposing that X lived and did not become insane, but that after the deposit was made Y died or became insane.

10. X writes to Y, "If you will promise to act as my agent for the term of one year, I will pay you \$100 a month." Immediately upon receiving this letter from the postman, Y mails to X, properly addressed and post-paid, a letter accepting the proposal. This letter never reaches X. Is there a contract?

11. Change the facts in the case just now stated by supposing that the letter does reach X, but that a few minutes before it reaches him Y has received from X a telegram of revocation.

12. Change the case again by supposing that no revocation is sent by X, but that a revocation is sent by Y to X, and is received simultaneously with Y's letter.

§ 13. X telegraphs Y an offer to sell 100 shares of Missouri Pacific stock at 90. Y immediately mails to X a letter of acceptance. Is X bound? *H*

14. In the same case can X hold Y?

15. In the same case, suppose that Y, instead of writing, waits two days and then telegraphs an acceptance.

16. X makes Y a written offer to sell specified land for a certain price, the offer to remain open for thirty days. Before the expiration of the time, Y accepts the offer and tenders the price. Meanwhile X has sold the land to Z. When the sale was made, Y saw an account of it in a newspaper. What right of action has Y against X?

17. X publishes an advertisement offering a reward of \$1,000 to any one who will give information leading to the discovery of the murderer of Z. Y, knowing nothing of the reward, but being a personal enemy of the murderer, gives the information. Must X pay Y the reward?

18. Change the case by supposing that Y, when giving the information, says: "If there is any reward offered for this information, you must distinctly understand that I do not want it."

19. B is attempting to sell his goods at auction. At the outset he announces that the sale is without reserve. C becomes the highest bidder for a certain article, but B thereupon withdraws it. Can C tender the price and claim possession of the article? *F*

20. In the last case, suppose that another article was knocked down to a by-bidder, D being the highest *bona fide* bidder. What rights has D?

21. X writes to Y: "I undertake to supply you for a year with such quantities of the following articles as you may order from time to time, and at the following prices." Y answers: "I accept." Afterwards X revokes the offer. Then Y orders some of the goods. X refuses to supply them. Can

Y successfully sue X? (See *Chicago & G. E. Ry. v. Dane*, 43 N. Y. 240; *G. N. Ry. Co. v. Witham*, L. R. 9, C. P. 16; *Pollock Con. * 60*, note by Wald; *Leake Dig. Con. 46*.)

22. On June 28, 1886, X and Y agrees to submit a certain dispute to arbitration. On July 1, X wrote Y a letter offering a compromise. The letter was mailed the same day, and was received July 2, at noon. Early in the morning of July 3, Y wrote a letter accepting the offer of compromise and inclosing a remittance as requested. This letter was mailed at 8 A. M., was delivered at X's office at 10:30 A. M., and was read by X at 1 P. M. At 10 A. M. X had written a letter revoking his offer. This letter was delivered by X's office-boy at Y's office, at 12:30 P. M., and was read by Y at 1:30 P. M. Discuss.

23. C makes a contract with B, a portrait-painter, whereby B is to paint a portrait and supply all of the materials. The price of the portrait is to be \$100. Does the statute of frauds apply?

24. Would the solution of the case be different if the materials were to be supplied by C?

25. B and C make a contract that is within both Sec. 4 and Sec. 17 of the English statute of frauds. C afterwards writes to B: "It is true that on January 1, 1886, you agreed to buy, and I to sell, 1000 bushels of wheat, on January 1, 1888, for \$1,000, but I repudiated that contract shortly afterwards, and still repudiate it. (Signed) C." B writes at the bottom: "This is all true. Filed with other worthless papers as a specimen of C's dishonesty. (Signed) B." Do these writings satisfy Sec. 4? Sec. 17? *Cv*,

26. C contracts to sell and B to buy C's horse. The horse is dead. Is the contract binding?

27. If B and C know that the horse is dead, is the answer to the preceding case changed?

28. X promises Y, a newspaper editor, that if Y will not publish a certain falsehood X will give him \$10. Discuss.

29. Add to the preceding case a supposition that Y has had the libel put into type, and that the sum promised him was the precise cost of the type-setting.

30. An infant rents land and, after attaining majority, retains possession. Can he escape paying rent that accrued during his minority?

31. If by mistake both parties to a contract call the subject-matter Bohemian oats, the fact being that it is Hungarian oats and that both parties mean the same kind of oats but do not know the right name, does this mistake prevent the formation of a contract?

32. If the contract just now described is reduced to writing, what kind of oats must the seller deliver?

✓ 33. X, a blind man, is told by Z that a paper presented to X for signature is an order for groceries. In fact, it is a letter addressed to Y, requesting Y to build a house for X according to certain plans and specifications referred to, and promising to pay \$5,000 for it when completed. Y, relying upon the letter, builds the house. Must X pay the \$5,000? X

✓ 34. In the preceding case change the facts by supposing that X, instead of being blind, is simply very busy.

35. X contracts to sell certain real estate to Y. It is a fact, unknown to X, that Y is simply a representative of a street railway company, which is really the purchaser. Can Y compel X to convey the property to him?

36. In an attempt to kill Y, X cuts off one of Y's ears. In return for X's promise to stifle civil and criminal proceedings, Y promises to pay X \$1,000. Discuss.

37. C and D make a contract with each other. E induces D to break the contract. Has C a right of action against E?

38. C promises D that, if D will allow D's child to live with C and to bear C's name, C will pay the child \$5,000 upon its attaining majority. D does as agreed. Upon attaining majority, can the child enforce C's promise?

39. C contracts with B to paint B's portrait. C dies before the portrait is finished. What right belongs to B, and what to C's representatives?

40. X owes Y \$499.50. Y makes demand. X offers him a \$500 bill. Y says he has no change. What must X do in order to perfect his tender? 

41. B and C are under contract to marry on a certain day. Before that day C marries some one else. When does B's cause of action accrue?

 42. B subscribes for an encyclopedia to be delivered by C in twenty-one parts. After receiving two of the parts B tells C to deliver no more. Need C attempt to deliver the other parts? Discuss.

43. Change the preceding case by supposing that immediately after the first part is delivered C announces that the publication is discontinued. What rights has B and when do they accrue?

44. B and C, in January, 1888, made a contract to the effect that B should write a book of a certain length and on a certain subject, and that on July 1, 1888, C should give B \$1,000 in full payment for his services. Nothing was said as to the time when the book was to be completed. B did not write at all. When could he successfully sue for the \$1,000?

45. Change the preceding case by supposing that B's promise was to have the book ready by April 1, 1888.

 46. C charters B's vessel for \$8,000 on condition of her being a vessel of 1,000 tons. The vessel is of only 500 tons. C accepts her but refuses to pay the \$8,000. If suit is brought by B, what, if any thing, can he recover?

47. In the preceding case, what remedy, if any, does C have?

48. For \$5,000 X sold to Y his stock and good-will as a manufacturer of candy and promised not to re-engage in the business in the city. Soon afterwards he did re-engage in the business. What remedies, if any, did Y have?

49. X, an opera singer, promised to sing for Y and received a month's wages in advance. He refused to sing for Y, however, and began to sing for Z. What were Y's remedies?

50. Vary the last case by supposing that X was a book-keeper and that his promise was to keep books.

Eugene Wambaugh.

HYPOTHETICAL CASES INVOLVING THE LIABILITY OF CARRIERS OF GOODS AND OF PASSENGERS.

[These cases are intended for use after the student has pursued a course of study on the subject. Some of them can be definitely answered by the application of well settled principles; on others the authorities are conflicting; as to some of them, very few, if any adjudicated cases will be found directly in point. It is recommended that the student not only make up his mind as to what the answer should be in each case, but that he find one or more adjudicated cases which may properly be cited as supporting his conclusion. He will thus do exactly what the careful lawyer does in determining what advice to give his client in a case submitted to him.]

1. The master of a sloop who has been in the habit of carrying lumber from a certain Wisconsin point to Chicago, for anyone offering a cargo, is employed by a Chicago lumberman, on special agreed terms, to bring a cargo of lumber from a different point, which the master has not before visited in his business. Is the employment that of public or of private carrier?

2. A railroad company offers by advertisement to carry a car load of goods and provisions from Iowa City to South Dakota sufferers, provided the merchants and others of the city contribute sufficient goods to load a car. In case the goods thus contributed are destroyed by accidental fire while in transit, is the carrier liable to any one? Would there be any liability in such case if the destruction was through negligence of the carrier, and if so to whom?

3. Is a railway company liable to a passenger traveling on a free pass for loss of his baggage accepted by it and destroyed by accidental fire without carrier's fault?

4. The master of a steamboat accepts and undertakes to carry a package of money between two points on his usual route. The owners of the vessel have not authorized that kind of business and receive no compensation. Are they liable for loss of the money through negligence of the master?

5. Goods in hands of express company for transportation are destroyed in a railroad accident. Can owner of goods recover from railway company, and will it be any defense that by contract between express company and railway company the latter is not liable to the former for loss of the goods?

6. In case of accident by reason of breaking down of bridge, passenger on railway train is injured, and his baggage damaged. Will proof by railway company that it was not in any respect negligent relieve it from liability for personal injuries, or for loss of baggage, or for both?

7. A trunk marked "Jordan & Co. Tailors Samples" is checked by a railroad company for a traveling salesman of the firm. Is the railroad liable for the loss of the trunk in absence of negligence?

8. A passenger on a railway train takes satchel into sleeper owned and operated by separate company, and gives it to porter, who places it under a berth. When passenger gets out next morning satchel cannot be found. Is railway company liable?

9. It is the habit of a river steamer to take goods left at its landing place, no regular warehouse being provided for its business. Goods left there during the day to be put on board the boat which is expected during the night are stolen without fault of the agent of the steamer. Is the owner of the steamer liable?

10. A person desiring to send a valuable diamond ring by express finds that the rate will be high on account of the

value of the article. He therefore conceals the ring in a cavity cut in a book, which is wrapped and sent in that form without any statement of value. Can he recover for loss due to theft by agent of carrier?

11. A grain buyer asks agent of railway company to furnish cars for transportation of wheat ready for shipment. The railway company is unable to furnish cars for a long time on account of prior calls for cars, and the total inadequacy of supply of grain cars for its traffic. Is the railway company liable in damages?

12. Would it make any difference in the last case if the railway company neglects to furnish cars to this shipper in order to supply competing shippers whom it wishes to favor?

13. Would it make any difference, under paragraph 11, that the agent definitely promises cars at a certain time but they are not furnished, owing to the stress of previous business?

14. The carrier having posted in his office a schedule of rates, a shipper delivers goods for transportation without any rate being agreed upon. The schedule rate is charged consignee at end of transportation, but by contract between consignee and consignor the latter is responsible for charges. Can consignor recover from carrier any excess over reasonable rates paid by consignee?

15. Goods are destroyed by railrond accident due to land slide in a cut, caused by rains. Is carrier liable?

16. Would liability in last case be the same if land slide is started by the operation of another company in building a track above that of defendant?

17. Would liability be the same as in paragraph 15 for loss occasioned by avalanche of snow?

18. Fruit shipped from California in the fall is delayed several days by reason of a wreck not due to carrier's negli-

gence, and goods thereupon injured by unexpected frost, which injury would not have happened but for the delay. Is carrier liable?

19. The propelling shaft of a steamer being accidentally broken without negligence, the vessel becomes unmanageable during a storm, and is driven upon rocks, which could have been escaped but for lack of propelling power. Is the owner liable for damage to goods due to the accident?

20. Striking miners being commanded to desist from disorder and destruction of property on a penalty of being suppressed by the military authorities, organize themselves under officers, arm themselves and attack a train bringing an armed company of soldiers sent to suppress the disorder. Is the railway company liable for the destruction, under such circumstances, of good which it is transporting on the same train as common carrier?

21. A box containing glassware of fragile nature is delivered to carrier without any information as to contents. In consequence of such handling as would not be improper in case of ordinary merchandise, the ware is damaged. Is the carrier liable?

22. Animals loaded in a car are during transportation allowed to go without food or water, and by reason of viciousness, aggravated by this cause, some are injured. Is the carrier liable, there being no special contract as to feeding and watering?

23. Would it be different in the last case if the suffering of the animals had been increased by reason of delay in transportation?

24. What would be the rule, under paragraph 22, if there was a stipulation that the shipper should send some one on the train in charge of the animals?

25. A bill of lading stipulates for the delivery of the goods to the consignor or order. Afterward by letter the

consignor directs the carrier to deliver the goods to A B, but he has in the mean time endorsed the delivery and bill of lading to C D, who has advanced money thereon. Will delivery of the goods to A B exonerate the carrier as against C D?

26. A bill of lading for delivery of goods to consignor or order, is endorsed with consignor's name by a clerk who has no general or specific authority to endorse bills of lading, and is transferred by him to a bank which afterwards transfers to a commission merchant who makes advances on the strength of the bill. Will delivery to such commission merchant relieve the carrier from liability to the original consignor?

27. A car load of agricultural implements reaches destination during the night, and is side-tracked ready to be unloaded by the consignee next day. During the night the car and contents are destroyed by accidental fire without fault of the carrier. Is the carrier liable?

28. Goods are delivered to a railway marked to a point not reached by the railway, but involving transportation from a point on its line by steamer to the point of destination. The goods are unloaded by the railway into a freight depot used in common by the railway company and the steamer company. Before they are taken on board the steamer they are destroyed by accidental fire without negligence. Is the railway company liable in the absence of any express stipulations?

29. J. B. Young & Co., an old firm in the lumber business, being rated high by the commercial agencies, a person by the name of J. B. Young, not a member of the firm, commences to do a notion business under the same firm name, and orders wall-paper from X & Co. in the firm name, using letter-heads of the lumber firm which he had fraudulently procured for that purpose, and explaining to X & Co. that the firm has been compelled to take an old stock of stationery and wall-paper in payment of a debt, and wishes to fill it up for the trade. The wall-paper shipped under this order is delivered by the carrier to the pretended firm of J. B. Young & Co. on

the representation of J. B. Y. that it has been ordered by him. The firm selling the wall-paper does so on the faith of the financial rating of the lumber firm, no other firm of that name being reported by the commercial agency. Can seller recover from the carrier?

30. A wreck due to burning of a bridge by tramps without carrier's fault, causes destruction of one car-load of wheat and detention of other car-loads on the same train. The bridge is repaired, and grain not destroyed comes forward as soon as practicable—say within 24 hours—but during the delay the price has greatly declined. What is liability of railroad company as to wheat destroyed and to that delayed, respectively?

31. The custom in case of shipment by sea being that goods shall be stowed below deck unless there is stipulation to the contrary, and there being no such stipulation on the face of the bill of lading, will the carrier be allowed to prove such an arrangement by parol evidence for the purpose of relieving himself from liability for damage to the goods by water, due to their being stowed above deck?

32. Under a contract between A and B for the sale of 100 tons of copper ore, A loads a quantity of ore upon a vessel for transportation to B, receiving a bill of lading describing the ore as 100 tons, and of a quality corresponding to the contract of sale. On delivery of the ore to B it appears that there is not the quantity mentioned in the bill of lading. Can the carrier avoid liability to B by showing that it did not receive the amount of ore mentioned? Will the rule be affected by the fact that (a) the ore is paid for by B before it was loaded, or (b) that it is paid for by B' on receipt of the bill of lading made out to A or order, and endorsed to B?

33. In case the ore is paid for by B on receipt of bill of lading, as in last paragraph above, can he hold the carrier liable because the grade of ore delivered is inferior to that mentioned in the bill of lading and required by the contract of sale?

34. By collusion between railway agent and shipper, bill of lading is issued for goods, no part of which is delivered to the carrier, and this bill is transferred for value to an innocent purchaser. Can he recover from carrier for failure to deliver goods described?

35. Will posting notice that carrier will not be liable for loss by accidental fire exempt him from such liability without other evidence of assent by shipper to such stipulation?

36. Will the rule in the last case be the same if the shipper knows that such notice is posted without expressly assenting?

37. Can carrier by express stipulation in bill of lading limit its liability for loss due to thefts committed by its agents, the rate of freight being made less in consideration of such stipulation?

38. Will stipulation in bill of lading for a piano, that carrier will not be liable in case of loss or damage beyond \$100, which it is agreed by the parties is the value of the instrument, relieve the carrier from greater liability where the loss is due to negligence?

39. Will a notice brought to shipper's attention by an express company that it will not be liable, in case of loss of any package, for more than \$50, unless the value of the package is declared to the company, relieve the carrier from liability for the actual value of the package in excess of \$50, where the loss is due to the negligence of carrier's agents?

40. Goods being delivered to a carrier marked to a point beyond its line, and being injured in the hands of a connecting carrier to which the first carrier has delivered them for transportation, can the first carrier be held liable?

41. Will a contract with the first carrier limiting its liability inure to the benefit of the second carrier by way of limitation of its liability to the shipper?

42. In case goods are delivered by carrier in damaged condition, need shipper prove in first instance that they were in sound condition when delivered to the carrier?

43. Where bill of lading exempts carrier from liability from loss by fire, and carrier shows by way of defense in an action for failure to deliver the goods that they were destroyed by fire, need he, to make out his defense, also prove that neither the fire nor the loss therefrom were due to his negligence?

44. On proof of delivery to one carrier for transportation over the lines of successive carriers, and failure of last carrier to deliver goods to consignee, is cause of action made out against last carrier for loss of goods?

45. Does the same rule as in last case apply in regard to damage to the goods?

46. Goods being transported by carrier to destination and delivered to a person not entitled to them, without freight being paid, can owner of the goods who recovers them from the person to whom they were wrongfully delivered be compelled by carrier to pay freight?

47. Can carrier recover freight where goods are destroyed in transit by public enemy?

48. Is carrier entitled to freight where goods become worthless in transit by natural decay?

49. Three car-loads of machinery for a mill are shipped under one bill of lading. Consignee accepts first car-load, supposing other two are to be delivered. Carrier fails to deliver balance, which has been destroyed by act of God. Can carrier recover *pro rata* freight from consignee?

50. Is the carrier liable for injury from negligence of servant to one who is riding free on invitation of conductor?

51. Would it make any difference in last case that the train is a freight train on which passengers are not allowed to ride?

52. An accident to a passenger train happens by reason of negligence in failing to properly inspect the track. Is the carrier liable for such injury to a tramp who is concealed under the car stealing a ride?

53. Under the same circumstance as in the last question is the carrier liable for injury to a brakeman on the train?

54. Under the same circumstances as above is the carrier liable for injuries to a person who is attempting to secure transportation on a non-transferable ticket issued to another?

55. May the passenger carrier grant to one baggage transfer company the exclusive privilege of soliciting business from passengers on the train, refusing to transport agents of other companies seeking to solicit the same business?

56. Aside from any statute on the question, is a railway company liable for injuries to passengers from an accident due to the fact that the cars are heated by stoves, it being conceded that other equally efficient and less dangerous methods of heating are practicable and in use on some roads?

57. A railway company having purchased an engine from a reputable manufacturer, an accident occurs by reason of a flaw in one of the wheels not discoverable on reasonable inspection. Is carrier liable for injuries to passengers resulting from such accident?

58. The ticket agent of a railway wrongfully causes the arrest of a person who has bought a ticket for passage, upon the charge of passing a counterfeit bill, the agent acting in good faith but under mistake. Is the railway company liable?

59. The brakeman on a railway train wrongfully ejects a passenger under the mistaken belief that he has not paid his fare. It being agreed that the authority to eject passengers for this cause rests with the conductor, and not with the brakeman; and that in this case the ejection was without authority from the conductor, is the carrier liable?

60. Would the carrier be liable in a case differing from the preceding one in that the person ejected was a trespasser attempting to ride without payment of fare?

61. Will the carrier be liable for injuries to a passenger getting off a car while in motion? Will it make any difference whether the passenger is directed to get off by a brakeman, or by a fellow-passenger, or jumps off to avoid supposed impending danger?

62. A child six years of age traveling in company with its father is allowed by the father to stand on the platform, from which it falls while the train is in motion, causing an injury. Can it recover?

63. Can the carrier by stipulations in a free pass limit its liability to a passenger with reference to injury from negligence of its employees?

64. By mistake of ticket agent the ticket sold to the passenger does not entitle him to transportation on the train on which he desires to ride. Notwithstanding an explanation by him to the conductor of the mistake, he is ejected from the train for not having a proper ticket. Can he recover damages for such ejection?

65. The passenger having offered for his passage a non-transferable ticket issued to another person, the conductor stops the train to put him off. He thereupon tenders the conductor money in payment of his fare to next station, a shorter distance than he at first sought transportation for. If conductor ejects without accepting this fare is carrier liable?

66. While dismounting from a train passenger has his leg broken. What proof would be sufficient to make out a *prima facie* right to recover damages therefor from the carrier?

Emlin McClain.

HYPOTHETICAL CASES IN THE LAW OF
CHATTEL MORTGAGES.

1. A being indebted to B in the sum of \$200.00, it is agreed between them that B shall take a team belonging to A in extinguishment of the debt, but that if in one year A shall pay to B \$200.00 with interest, he shall have the team back. Is this a chattel mortgage?

2. A lease of realty provides that the rent shall, when due, become a lien upon the tenant's household goods including those exempt from execution. The lease is recorded among instruments affecting realty. Will a purchaser of a portion of the household goods from the tenant take subject to the lien of rent then due?

3. Does a recorded chattel mortgage upon a growing crop have priority over a subsequent conveyance of the realty to one having no actual notice of the mortgage?

4. A owns premises used as a steam flouring mill, and covered by a real property mortgage to B. A then purchases from C a steam boiler, giving to C a chattel mortgage thereon for part of the purchase price. The boiler is afterwards put in the building by way of a permanent annexation. B having foreclosed his mortgage and bought in the property thereunder, can C reclaim the boiler under his chattel mortgage?

5. In the preceding case could B, without having foreclosed his mortgage, prevent C from retaking the boiler under the chattel mortgage?

6. In the case referred to in the last two paragraphs, would the rights of the parties be the same if B's mortgage on the realty were executed after the annexation of the boiler, the chattel mortgage being on record?

7. In April a tenant gives a chattel mortgage on the crop of corn to be raised by him the ensuing summer upon the leased premises, the crop being as yet unplanted. After

planting the crop the tenant gives another mortgage on the same crop. Does the second mortgage have priority over the first mortgage, which was duly recorded when given?

8. Does a recorded mortgage upon a crop to be planted constitute a valid lien as against a purchaser of grain threshed and sold on the market which is the product of such crop?

9. A mortgage being given upon a stock of goods and all additions thereto, and being duly recorded to secure an indebtedness due in three years, the mortgagor at the expiration of two years and after the stock on hand at the time of the first mortgage has been entirely disposed of and replaced by other stock, gives a second mortgage. Which of the two mortgages takes priority, the stock having in the mean time remained in the possession of the mortgagor in accordance with stipulations in the first mortgage?

10. A having given an absolute bill of sale of chattels which is duly recorded, the possession remaining, however, unchanged, subsequently gives a chattel mortgage upon the same property. The goods, being delivered to the mortgagee, are claimed by the vendee under the bill of sale. Will the mortgagee be allowed to show by parol evidence that the bill of sale as between the parties was intended only for security?

11. If in the last case mortgagee is allowed to show the character of the bill of sale, can the vendee assert as against the second mortgage a lien to the extent of the indebtedness intended to be secured by such instrument?

12. A bill of sale absolute in terms being given from son to father, will parol evidence be admissible to show that the only previous conversation between them with reference to the matter contemplated the execution of an instrument for the purpose of securing a debt?

13. A mortgage covers "one team of bay horses four years old." Can parol evidence be introduced as between the parties to identify the property?

14. Is the mortgage mentioned in the last case enforceable against the purchaser of the property without actual notice of the mortgage, it being, however, duly recorded; and is parol evidence admissible as against him to show that the mortgagor owned such a team as that described in the mortgage and that it is the same team sold to such purchaser ?

15. Is a mortgage of "ten head of fat cattle" valid as between the parties upon proof that the mortgagor had only ten head of cattle at the time and that they were the animals intended to be covered by the mortgage ?

16. A mortgage is given on 20 acres of wheat to be grown by mortgagor on certain described premises. There being no wheat planted at the time the mortgage is given and a field of 40 acres being subsequently put in on said premises for the season next following the execution of the mortgage, what objections can be made to the validity of the mortgage on the part of a mortgagee of the whole crop ?

17. A chattel mortgage being given to secure an indebtedness of \$500.00, the parties subsequently cancel the same and the notes secured thereby, and execute a new note and mortgage for \$1,000.00, including the original and other indebtedness. In the meantime a second mortgage has been executed. Does the second mortgagee take subject to the whole or any portion of the indebtedness secured by the last mortgage ?

18. One who is engaged in the stock business borrows money to invest in live stock in his business, giving to his lender assurance that in case he becomes involved in difficulty he will secure such lender by chattel mortgage upon the stock purchased by his money. Fearing that his property may be attached for other debts the borrower executes a chattel mortgage to the lender on all his live stock, a portion being animals bought with the borrowed money, and gives this mortgage to the recorder for registration, advising the lender of what he has done, but before the letter containing this

information has reached the lender the stock is attached for other debts. Does the chattel mortgage take priority over such attachment?

19. A gives a chattel mortgage on property actually belonging to B, which mortgage B ratifies. Subsequently B gives a chattel mortgage on the same property. The mortgage by A being duly recorded does it take priority over the mortgage by B?

20. A mortgage being given on a growing crop of corn the mortgagee enters upon the land by the consent of mortgagor and tills the corn and does all that is customary in the care of it. Before it is harvested the mortgagor sells the premises to one who has no actual knowledge of the facts. The mortgage not being on record, does the purchaser of the realty take priority over the mortgagee?

21. A being owner of a team which he has hired to B for the season, executes a chattel mortgage thereon to C, and afterwards sells the same to D. The mortgage not being recorded, does D have priority over C?

22. A executes a mortgage upon chattels to B, which mortgage, not being recorded, he executes a second mortgage on the same chattels to C, who has no actual notice of the first. B thereafter succeeds in getting his mortgage on record before C's mortgage is recorded. Which of the mortgages takes priority?

23. A, living in Johnson county, gives a mortgage upon a team of horses which is there recorded. He then removes the team to Kansas, and after living there six months, sells to a purchaser who has no actual notice of the mortgage in Iowa. Does the mortgagee lose his lien as against such purchaser?

24. A and B, residing in Johnson county, carry on a partnership business in Cedar county. A chattel mortgage on the stock belonging to the partnership is executed at their place of business and is recorded in Cedar county. Is such

mortgage valid as against attaching creditors who have no actual notice thereof until after levy?

25. A mortgage on household goods being properly executed and recorded in Cedar county, where the owner resides, the goods are afterwards brought to Johnson county and sold at auction by William Jones, auctioneer, the articles of property being delivered by him to the respective purchasers. Can the mortgagee recover damages against such auctioneer for conversion?

26. A lot of hogs, covered by chattel mortgage, duly recorded in Johnson county where the owner resides, are by him shipped to a commission merchant in Chicago who makes advances on the bill of lading. Does the chattel mortgage have priority over the claims of such commission merchant?

27. A retail merchant, being indebted to the wholesale dealer from whom he has purchased goods, secures extension of time on the representation that he has no other considerable outstanding debts. In fact, he is indebted to a large amount to a relative who has advanced him money to be used in the business. After the extension of time is secured the debtor executes a chattel mortgage to his relative for the amount of his advances. Is such mortgage void as to the general creditor?

28. Would it make any difference in the case last above if the general creditor had secured judgment on his claim before the mortgage was recorded?

29. A debtor in embarrassed circumstances make a general assignment under the laws of Iowa. Can an unrecorded chattel mortgage be enforced as against the assignee?

30. A executes to B a chattel mortgage intended by both parties as a fraud upon A's creditors and not as security for a *bona fide* debt. C proceeds to foreclose against the property an unrecorded mortgage thereon, executed prior to B's mortgage. As between B and C, which has the better claim?

31. The property of the debtor being levied on under execution and sold at sheriff's sale to the judgment creditor, does he take priority by his purchase over a chattel mortgage which was executed before his levy and put on record between levy and sale?

32. A general creditor, having heard by rumor that his debtor has given an unrecorded chattel mortgage, sues out an attachment and causes the writ to be levied upon his debtor's property. Does he thereby acquire a lien prior to that of the unrecorded mortgage on the same property?

33. How would it be in the case last above if the first information with reference to the unrecorded chattel mortgage is that which is given to the sheriff when he is about to make a levy on the property?

34. A merchant gives to his creditor a chattel mortgage upon his stock on hand and all future additions thereto, with the stipulation that the mortgagor shall retain possession, and with the private understanding that it shall not be recorded, so that the merchant may acquire a larger stock of goods and thus make the creditor more secure. Is such mortgage valid as against one who extends credit to the merchant on the faith of his stock and without knowledge of the mortgage?

35. A gives to B a chattel mortgage which is duly recorded but which is actually without any consideration, the intention being to thereby induce creditors not to levy upon the mortgagor's property covered by such apparent mortgage. Subsequently the mortgagee himself proceeds to foreclose such mortgage. Has the mortgagor any defence?

36. A gives a mortgage to B to secure a pre-existing debt. He then gives a mortgage to C to secure another pre-existing debt. Both mortgages being unrecorded and C having had no notice of B's mortgage, which has priority?

37. Mortgagor of property described as "25 head of three-year-old cattle, being all the cattle now owned and kept by me on my farm in Johnson county, Iowa," being in pos-

session in accordance with the terms of the mortgage, sells particular animals to butchers and others, the animals thus passing from the reach of the mortgagee. The mortgage being recorded, has the mortgagee a right of action against the mortgagor for damages with reference to the cattle thus sold?

38. The mortgagee being in possession of mortgaged cattle, sells particular animals out of the lot as his own. What remedy has the mortgagor, if any?

39. The mortgagee of a team sells them as his own to a purchaser, who re-sells them. Has the mortgagor any cause of action against the first purchaser from the mortgagee, or against the second purchaser, who still has the animals?

40. The mortgagee assigns a note secured by the mortgage to one who pays less than face value therefor, taking it, however, in due course of business before maturity and without notice, by usual endorsement. In an action by the purchaser of the note to foreclose the mortgage, can the mortgagor set up the defence that he was induced to sign the mortgage by the representation and under the belief that he was simply signing a receipt for the property, which he had just bought from the mortgagee and for the purchase price of which the mortgage was given?

41. Mortgagor, on the day when the secured debt becomes due, tenders the amount thereof to the mortgagee, who refuses to accept, claiming to be absolute owner of the property by virtue of transfer from a third person. In an action of replevin by mortgagor to recover possession, can mortgagee assert title under the mortgage.

42. Where mortgagor has, on the maturity of the secured debt, tendered the full amount thereof to mortgagee, is it necessary for him to show in a subsequent action of replevin for the property that he has kept the tender good?

43. Mortgagee, having seized the property after forfeiture, has the same offered at auction to highest bidder in ac-

cordance with power of sale in the mortgage. An agent of his buys in a portion of the property. Can the mortgagor subsequently redeem the property thus bid in by mortgagee?

44. A mortgage being given upon three horses, two of them are sold under the mortgage for a sum which is sufficient to cover the amount of the mortgage debt, interest and costs. Immediately thereafter the person making the sale proceeds to offer and sell to the highest bidder the third horse. The amount received for the third horse being offered to the mortgagor, who refuses to receive it, can he recover the animal by replevin from the purchaser?

Emlin McClain.

DOWER IN IOWA.

The ordinance of 1787 for the government of the "North-west Territory," had the following among its provisions: "That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to and be distributed among their children and the descendants of a deceased child in equal parts; the descendants of a deceased child or grandchild to take a share of their deceased parent in equal parts among them; and when there shall be no children or descendants, then in equal parts to the next of kin in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall in no case be a distinction between kindred of the whole and half blood; *saving in all cases to the widow of the intestate her third part of the real estate for life*, and one third part of the personal estate."¹ The ordinance contains no other provision relative to dower than as above quoted.

In *O'Farrell v. Sinplot*, 4 Iowa, 381, the court expresses the opinion that the ordinance of 1787 carried the common law into Iowa, and the repeal of all other statutory provisions relative to dower by the legislature, in 1843, left the ordinance in force in the territory in respect to this estate.

¹ Code of '51, 482.

By the act of Congress organizing the territory of Michigan, approved January 11, 1805, the people of that territory were given "all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio by the said ordinance."¹ And in the organic act of Wisconsin, approved April 20, 1836, Congress provided for the people of the territory then established, which embraced the country now within the boundaries of Iowa, that "the said inhabitants shall also be entitled to all the rights, privileges and immunities heretofore granted and secured to the territory of Michigan and to its inhabitants; and the existing laws of the territory of Michigan shall be extended over said territory so far as the same shall not be incompatible with the provisions of this act. * * *"² The enactments in respect to dower and descent contained in the ordinance of 1787 had been granted and secured to the people of Michigan. Hence by the organic act of Wisconsin they were extended to what is now Iowa. By another part of the organic act of Wisconsin "the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio by the *Articles of Compact* contained in the ordinance for the government of said territory * * *"³ were granted to the inhabitants of the new territory. But the passage quoted relative to descent and dower was no part of the *Articles of Compact*, and hence were extended to Wisconsin by the act organizing it making the rights before granted to Michigan rights of the people of Wisconsin. Again, when the act establishing the territory of Iowa was passed June 12, 1838, the inhabitants were granted "the rights, privileges and immunities heretofore granted and secured to the territory of Wisconsin and to its inhabitants."⁴ Twice, therefore, did Congress extend to the territory of what is now Iowa the rights, privileges and advantages contained in the ordinance of 1787 in respect to descent and dower, as well as the rights, privileges and advantages contained in that part of such ordinance

¹ Id. 514.² Id. 522.³ Id.⁴ Code of '51, 530.

called *the Compact*. As to its provisions respecting descent and dower the ordinance enacted that they should remain in force until altered by the legislature of the district. But the compact embraced in the ordinance and therein styled "Articles of Compact between the original states and the people and states of the said territory" was to remain until a change thereof was mutually agreed to. One of the provisions of the Compact stipulated for judicial proceedings according to the course of the common law.¹ This, however, cannot be construed as introducing the common law to the country for which the ordinance was to be law, except as to judicial proceedings. Dower is not a judicial proceeding.

It is very plain from the context that the provision in the quotation from the ordinance relative to dower was inserted to prevent a construction of the clauses preceding it such as would destroy the right of a wife of one who died intestate to a share in the real estate of her husband. The word "saving," the introductory word of the clause respecting dower, is used in the sense of preserving. The ordinance assumes the existence of a known and defined estate of dower and takes a precaution to guard against its destruction through the innovation therein in respect to the descent of the real estate of one dying without leaving a will. If this ordinance established the common law dower it established it for the widows of intestates only.

The first enactment by the territory of Iowa on the subject of dower was that approved January 25, 1839. This statute provided that a bequest or a devise should cut off or bar a widow's dower unless she pursued the course therein prescribed; and that in case she pursued the means to prevent the bequest or devise barring her dower, or in case her husband died intestate, she should be entitled to a one-third part of the real estate for life.² This act covered all that the ordinance covered and more, and purported to be the exclus-

¹ Ordinance of 1787, Art. 2 Code '51, 493.

² Laws of 1838-39, 484 and 485.

ive law on the subject. Therefore this act repealed the dower provision of the ordinance.¹

The territorial legislature, by an act approved July 30, 1840, abolished all acts of Michigan and Wisconsin, in force on the fourth day of July, one thousand eight hundred and and thirty-eight, and by the same act declared that the repeal of an act should not revive any act previously in force unless express provision to that effect was contained in the repealing statute.²

Therefore, when the act of January 25, 1839, was repealed by the act of February 13, 1843, the provision for the dower of the widows of intestates of the ordinance was not revived, and all statutory support for the estate of dower was swept away. The territorial legislature again, in 1845, made a law in regard to dower. By the 6th section of an act approved June 10 of that year, the dower of widows was declared to be "as fixed by the common law."³ Was there no dower in Iowa between February 13, 1843, and June 10, 1845?

The answer to this question is reached in this manner: The common law was brought into Iowa by its first settlers. The statute of January 25, 1839, supplanted the previous law relative to dower. The repeal of the act of 1839 by the statute of February 13, 1843, left the common law dower in force.⁴ The common law dower existed in Iowa from February 13, 1843, to June 10, 1845, but its existence was in no degree attributable to the ordinance of 1787.

The Code of '51 made the estate of dower a fee simple of one-third in value of the legal or equitable estate in real property which the husband had owned at any time during the marriage, which had not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right.⁵ By Chapter 61 of the Acts of the Fourth General Assembly the common law was restored and

¹Suth. Stat. Cons. § 155; U. S. v. Tynen: 11 Wall. 88; U. S. v. Clafin, 97 U. S. 546 Hamilton v. Schoenberger, 47 Ia. 385.

²Laws of Extra Session 1840, Chap. 29.

³Laws of Iowa, Extra Session 1844, Chap. 21.

⁴Mathewson v. Phoenix, 20 Fed. Rep. 281.

⁵Code '51, Sec. 1244.

the dower of the Code of '51 was abolished. This was in 1853. The dower of the Code was restored by the legislature in 1862.¹ The Code of '73, as construed by the Supreme Court, provides a dower or "distributive share" substantially identical with that of the Code of '51,² although it expressly abolishes the estate of dower. *Samuel Hayes.*

¹ Gen. Ass., Chap. 151.

² *Mock v. Watson*, 41 Ia., 241.

MISCELLANY.

A BOOK ON THE STUDY OF CASES.

Professor Wambaugh has in press a volume entitled "The Study of Cases," which is largely the result of the courses in case-study given at this university in the last two or three years. It opens with a general view of the subject, the chapters of this introductory portion being entitled: How to Study Cases; How to Find the Doctrine of a Case; Cases Involving Several Questions; How to Write a Head-Note; How to Criticise Cases; Combining and Comparing Cases; The Growth of Legal Doctrine; and The Importance of Unwritten Law. Then follow numerous cases for study.

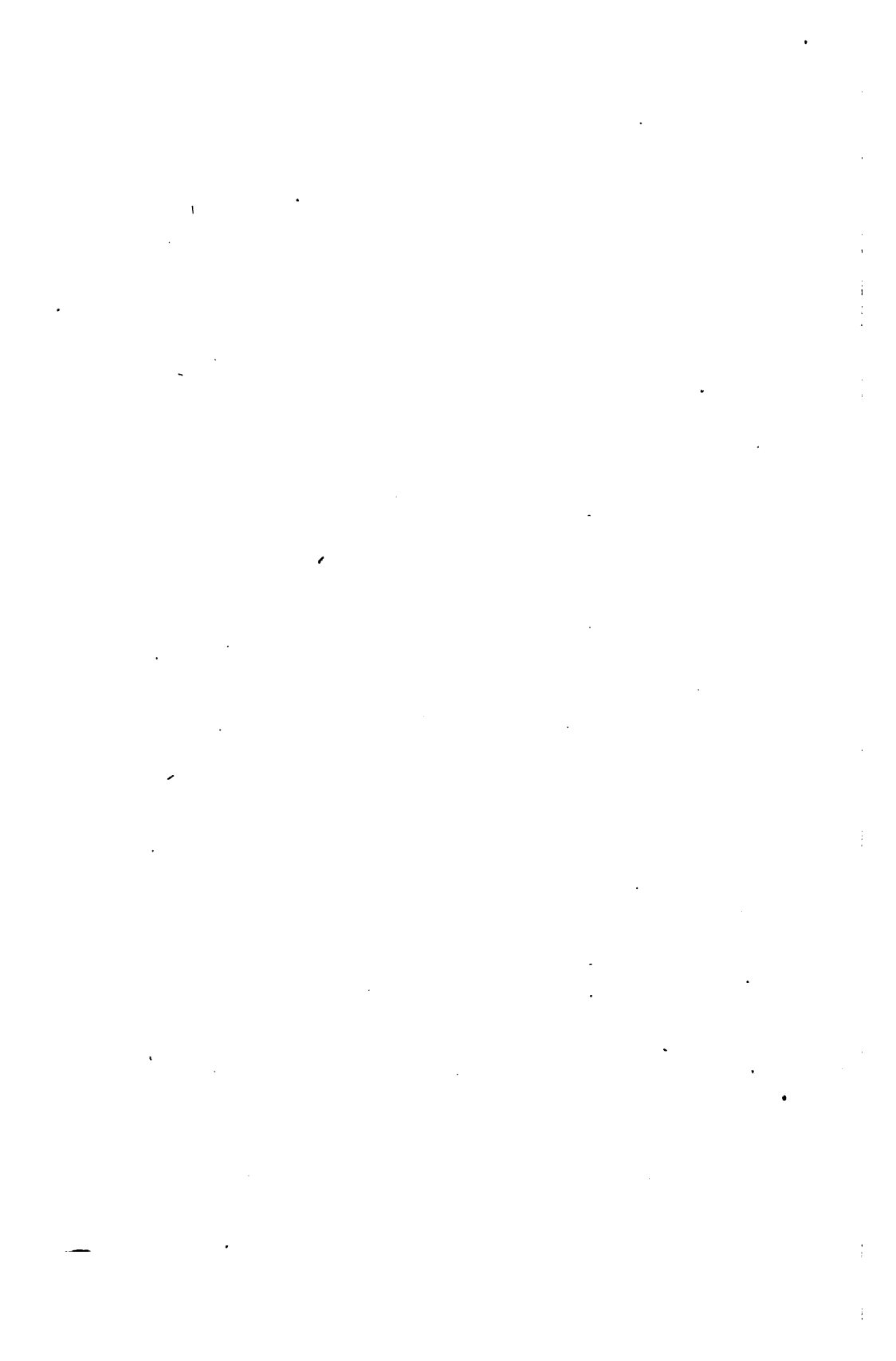
The general purpose of the volume is to teach students to state cases, to detect *dicta*, to write head-notes, and to discuss authorities. While the volume is intended to be used as the basis of an independent course in case-study, it also supplements other courses by compelling the student to study carefully many cases on contracts, torts, and other subjects.

The volume will contain about three hundred pages. It will be published by Little, Brown, & Co., of Boston.

RECENT CASES.

On contracts in restraint of trade, and on injunctions to prevent breach of contracts, see *Sternberg v. O'Brien*, 22, Atl. 348 (N. J. Chancery, 1891), s. c. 33 C. L. J. 224, 227, note.

On contracts intended to cause a post-office to be retained in a certain part of the city, see *Woodman v. Innes*, 27 Pac. 125 (Kansas, 1891).



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CLASSIFICATION OF THE LAW.¹

In considering the proper purpose of classification, it may be first suggested that the object is not to determine what the law is. Classification will furnish a map from which the relations of parts may be seen and thus it will assist in the determination of controverted questions; but, primarily, it deals only with what has been decided and simply seeks to arrange such matter in convenient form for comprehension and retention. The law has been built up on other lines. It exists for other reasons. Classification must yield to the facts as they are and do the best that can be done in bringing them into symmetrical relations.

Therefore it is apparent that no system of classification of any practical utility can be devised which shall be suitable to more than one legal system. Distinctions which may be important in one may be of no consequence in another. Thus as between the civil and the common law there are some points of analogy, but, at the same time, the differences are so great that no common classification descending to any degree of

¹ At the annual meeting of the American Bar Association in 1890, a special committee was appointed on classification of the law, consisting of Wm. B. Hornblower of New York City, Emilin McClain of Iowa City, Charles Theodore Russell, Jr., of Boston, and E. T. Merrick, Jr., of New Orleans. By direction of the committee a report was prepared by Mr. McClain and submitted to the Association at its meeting in Boston last August, the principal portion of which is here given, as it will appear in Vol. 14 of the Reports of the American Bar Association.

particularity is attainable. It is true that some notions of classification developed by the civilians have been adopted as applicable to our system, but it will be found impracticable to carry out the civil law classification to a point where it will harmonize with the divisions of subjects recognized by writers on the common law.

Moreover, a system of law does not develop symmetrically from 'age to age. What has once been a mere offshoot may become a principal branch, while other branches dwindle in proportion, or, perhaps, entirely lose vitality and die out, so that a re-arrangement may become necessary. Again, different classifications, each having its peculiar merits, may be made by persons taking different points of view. These will not be harmonious, and a choice between them will be a mere matter of judgment on which it would be difficult at once to agree.

The object, therefore, to be sought is not merely a classification which shall be sufficient for the time being, and satisfactory to those who make it, but one which shall be in harmony with the spirit of the law as it grows, and shall prove not only acceptable to all who take the pains to comprehend that spirit, but also adaptable to different stages of development. For this purpose it should take cognizance of the history of the law, for thus lines of growth may be recognized and the direction of change anticipated; but the mere casualties of growth, depending upon extrinsic causes, cannot be made the basis of classification, which, to be of any value, must have regard to that which is inherent, and, therefore, permanent. If such a classification can be secured, it will not only be of great assistance in understanding the expression of the law as it is, but will have great influence upon its future development and will soon become embodied in the mass of legal literature so as to be practically unchangeable.

These considerations will show that it would be preposterous for any man or any set of men to originate and bring into use, of their own volition, any original arrangement of the law. It would be highly inexpedient to attempt to introduce any

original scheme, however ingenious or satisfactory it might be from a theoretical standpoint, or to employ in the arrangement newly coined terms which have not already received some recognition. All that it is hoped to do, and all that it would be, perhaps, expedient to do, is to put into more definite form that which has received some sort of general acceptance, and secure for it adoption by those who have occasion to consider the parts of the law in their relations. To this end an effort will be made to employ only terms which are, at least to some extent, already in vogue, hoping, by accurately specifying the connection in which they are employed, to secure for them more definite meaning and more technical use. Seeking, therefore, such light as has been thrown on the subject by reputable writers, for the purpose of discovering what general arrangement, if any, has been recognized by them, plans of arrangement more or less complete and comprehensive proposed by various authors from Lord Hale down to the present time have been considered. A list of such works as have been referred to, and are deemed important, is given in the Appendix to this report.

On reflection it will be found that there are two principal objects of classification. First, an orderly arrangement of the law which shall enable the human mind to comprehend it as a whole, the parts or divisions being homogeneous and bearing definite relations to each other, so that any question which arises for consideration or decision may be referred to its proper division and placed in connection with cases having points of true analogy; second, a convenient cataloguing, as it were, of the principal topics of the law, each with a well recognized title, under which the authorities may be collected and which shall serve as a key to them when search for precedents is to be made. These two objects are not necessarily consistent, and it will be found that they are not practically so. The first is of greater importance to the jurist, the teacher and the student. It relates to comprehension. The second is of primary importance to one who desires a guide through the immense mass of legal literature, a clue especially to adjudicated cases

in point, therefore, to the judge and the lawyer. So different are these two objects that those who feel the importance of the one are apt to ignore the necessity of the other. So distinct are they that familiar terms in the one are likely to be unknown in the other. The division of law into public and private, or substantive and adjective, or of rights into those *in rem* and those *in personam* is well known to theoretical jurists, and yet a lawyer would seldom make use of any such division in seeking the topic under which the subject which he is investigating is to be found. Such heads are not, and cannot be, used in digests or indexes. On the other hand, such titles as Abatement, Banks, Continuances, and Instructions are heads under which precedents are very commonly arranged, but no such divisions would be found in any theoretical classification. It is evident that the theoretical divisions are too general for practical use, and that the practical arrangement of topics for encyclopedias, digests and indexes is too limited for the purposes of the jurist.

It would seem, therefore, that two classifications are necessary and that the second, which shall furnish a well defined list of topics or heads under which points decided by the courts may be arranged for convenient reference, is of the more general importance, but the second classification, instead of being as it now is, haphazard, and largely according to each man's taste or judgement, ought to have definite relations to the first so that it may be theoretically satisfactory, while at the same time its terms are such as are well known so that they may be generally accepted. The advantage that would result from the adoption of such a classified list of subjects, each of which would have a recognized scope, can at once be seen. The mass of legal literature is so great that without such arrangement large parts of the matter are almost entirely inaccessible and much time is required in the search for that which is placed under different heads by the respective authors and compilers whose works it is necessary to consult.

With reference to this arrangement of topics, as well as

the theoretical classification as above suggested, it is absolutely necessary to conform as nearly as may be to existing usage. An arrangement which is to meet the needs of busy men must not require from them the learning of a new language. The best that can be done is to give more definite boundaries to topics the scope of which is already generally recognized, rejecting entirely such as are not suitable for the purpose, and by cross references under each subject pointing out where matter that might there be looked for is to be found. Nothing more will be attempted, however, at this time, than to present a sketch of what seems attainable under the first head.

In seeking proper lines along which to divide the law for analytical purposes, one of the chief aims must be to secure divisions which, while together covering the whole, shall not overlap each other. The tendency in discussing any one branch of the law is to extend it beyond its proper bounds, and cover, in a partial way, much ground which is, strictly considered, in another field and can be there more thoroughly cultivated. For instance, the power of married women to bind themselves or their estates by contract may properly be discussed under the topic which is devoted to peculiarities or variations of the law due to personal status, but it will also be found discussed under the head of contracts and that of equity, as well as under the more uncertain headings of domestic relations, marriage and divorce, and husband and wife. So a writer on the special topic of railroads usually considers the whole law of corporations, that of agency and that of carriers, covering in this partial way many subjects which, in view of their analogies, ought to be left for separate treatment. The disadvantage of having the same subject treated under different heads is not merely the increase in volume due to duplication, but the danger that the treatment under any one head shall be partial and incomplete, and that other matter on the same subject which has been put elsewhere may be overlooked.

So little attention has been paid to this subject of classifi-

cation by those who have written upon topics of the law under the common law system, that the overlapping of titles is universal, and if a connected and systematic statement of the law is ever secured it will be found that by excluding from each topic subjects which are properly discussed elsewhere, the apparent bulk of the whole will be greatly reduced.

Civilians, on the other hand, have been trained in a system where questions of analysis and classification receive great consideration. That system deals with legal questions in the abstract and does not so much concern itself with the concrete problems involved in specific cases. But we shall be much misled if we shall expect to get from them any ready made solution for our difficulties in classification. Their system of law differs enough from ours to prevent any plan they might agree upon from being fully applicable with us. Moreover, they have by no means settled among themselves some of the very questions which are our most serious stumbling-blocks. As the work of the civilians has been threshed over and over again by those proposing classifications for our own system, it may be assumed that all the matter which is available has already been adopted, and it will be advisable to avoid any reference to plans or divisions which have not received the sanction of some English or American writer on the common law.

It will now be proper to discuss the various divisions of law usually made, and determine which it is desirable to retain and which to disregard, and also to consider their relative importance, and how far one can be subordinated to another. The following divisions will probably be recognized as familiar:

As to form:—Written and unwritten.

As to persons involved:—First, with reference to whether the persons are sovereign states:—International and internal. Second, with reference to whether the persons are sovereign and subject, or subjects only:—Public and private. Third, with reference to whether persons subject thereto have rights conferred and duties imposed upon them by reason of any

peculiar or abnormal condition, natural or artificial, which puts them in different relations to other persons in general than those which subsist between ordinary persons:—Normal and abnormal.

As to the subject matter involved:—Rights, wrongs and remedies; or substantive and adjective.

With reference to the form of the law it may at once be said that any division based on differences of this kind is of slight consequence, either in determining the theoretical relation of the different subjects, or in fixing practical headings under which the law may be discussed. In an institutional treatise there would be at the outset a most important and interesting discussion of what law is, involving consideration of law in its broadest sense, the divine law, positive law, natural law, etc.; with a final definition of law in the sense in which it is used in jurisprudence, and a statement of its nature and sources. It would be necessary in such connection to discuss whether law is a body of commands directly or indirectly promulgated by the sovereign power, or a body of rules or principles based on custom, reason, or general notions of right in accordance with which the conduct of the members of the body politic is judged by the sovereign power acting in its capacity as protector of the public welfare and arbiter of controversies which come within the scope of its control, which rules or principles are subject to various degrees of conscious and unconscious modification. In either view the distinction between written and unwritten law will be recognized, and the methods by which written law is made, and how it affects previous law, written or unwritten, and how it is affected by subsequent written law, and indeed, the whole matter of interpretation and construction, would properly be considered. It is believed, however, that a distinction must be taken between the making of written law and ordinary legislation, for, while legislative action is the source of both, yet the purposes and characteristics of the two are widely distinct. There seems to be no connection between a statute regulating descent of property, or defining and fixing the punishment of

a crime, and one which makes an appropriation for the erection of a public building and directs how the money shall be expended, except that both are enacted by a legislative body.

Passing, then, from form, which does not seem to furnish any basis of classification, we have next to consider divisions based upon the persons affected, and it is proper to suggest at once that the whole body of the law affects persons and has relation to subject matter so that it is impossible to make this distinction, between persons affected and subject matter involved, the basis of classification. All the law might be arranged under the one head or the other.

But there are certain possible divisions having reference to the nature of the persons affected which it is necessary to consider. It is not important to elaborate the thought that the sovereign state, or the sovereign power in the state, may be considered as a person; such a conception is old and well recognized. We may, therefore, take notice of the fact that sovereign states may have relations to each other and that the sovereign power in a state may have relations to those subject to it, and that the subjects may have relations to each other not involving in any way the state and which would exist if the sovereign power and all dependent upon it should be changed.

International law as a system of rules and principles regulating intercourse of sovereign states with each other has been denied a place as part of the law by those writers who insist that law is a collection of command from a superior to an inferior. But according to other views international law may properly be included in the body of law in the sense in which that term is recognized in jurisprudence; and adopting this view as one sanctioned by general usage, we may divide the law into international and internal. That which is thus designated as internal (otherwise well known as municipal) may again be divided with reference to whether it concerns the relations between sovereign and subject, or those between subject and subject, into public and private. It will be seen, therefore, that the division into public and private is subordinate

to that into international and internal. The common division of international law into public and private is wholly anomalous and unwarranted, the so-called private international law or conflict of laws, being not international law at all but a part of the internal law and depending entirely upon the state where it is to be applied. Conflict of laws will perhaps find no distinctive place in the classification which we are proposing, and, indeed, probably deserves none as it seems to be only a collection of rules having no uniformity or coherence and properly discussed under other recognized headings.

Public law may be divided into constitutional law, legislation, administration, and criminal law, including criminal procedure. The distinction between public and private law is not difficult to apply, unless it may be with reference to criminal law, for, while a crime is theoretically an offense against the sovereign and gives rise to a proceeding by the sovereign against the subject, yet, as a matter of fact, the interest of the sovereign is in many crimes recognized as being only that interest which a sovereign has in protecting the subject. But the protection which the sovereign furnishes the subject by criminal proceeding is a general one for the benefit of the whole public rather than a particular one for the benefit of the subject injured, and therefore, very properly, the criminal law is to be deemed a part of the public law, even though it involves the relations of subjects to each other and would be persistent regardless of changes in the form of government.

The distinction between normal and abnormal law is a fundamental one. Taking the ordinary human being as typical, those rules which are applied to his relations with others may be said to be normal, while any rules specially regulating the relations to his fellows of one who is in some respect distinguished from them may be said to be abnormal,¹ or in the

¹ The Chairman of the committee objects to the use of the term "abnormal" on the ground that etymologically and by common usage it indicates something contrary to law or rule. It is, perhaps, unfortunate that an apter name for this division of the law cannot be suggested, but since the introduction of the term by Dr. Holland in his *Elements of Jurisprudence*, it has received some recognition and no better term has been proposed. It is to be noticed, however, that the table does not indicate that the law as to natural

same sense the terms normal and abnormal may be applied to the persons themselves whose conduct is thus regulated. This distinction is, perhaps, of no consequence in international law. It certainly is practically recognized, however, in public law, and, therefore, the division into normal and abnormal is not to be subordinated to that into public and private law, unless it may be for purposes of mere convenience.

As to the third basis of classification, the subject matter involved, the elements of rights, wrongs, and remedies are at once apparent. As to rights and wrongs, they are correlative terms, and all law might be classified with reference to one or the other basis. The more common practice has been to classify chiefly with reference to rights, although classification with reference to wrongs, that is, violations of rights, has also been suggested. Rights and wrongs, however, are distinguishable from, and may be fully considered without regard to the remedies which the law provides for their protection on the one hand, or prevention on the other. And here is apparent the distinction which is intended to be indicated by the terms substantive and adjective law. This distinction is a fundamental one, applicable to international law, to public law, and to private law. In international law the adjective branch is well recognized, though but very imperfectly developed. In criminal law the distinction is fully taken between the definition of crimes and the provision for their punishment; and in private law the adjective branch becomes a most intricate division which may be denominated, in general, civil procedure.

It will thus be seen that there are several lines of division running through the whole subject, neither one subordinate to any other, rendering it impossible to construct a scheme by which we may have perfectly consistent grand divisions, minor divisions and subdivisions corresponding in any way with the

persons is abnormal, but simply that abnormal law, that is, the law which depends upon peculiar conditions or relations of persons, has reference either to natural or artificial persons. In regard to natural persons the abnormality consists in their being idiots, lunatics, minors, aliens, etc., or husbands and wives, principals and agents, masters and servants, etc. Nor is it indicated that these conditions or relations are abnormal, but only that they give rise to rights and duties as between the persons thus affected and others which do not exist with reference to persons not thus affected,

attractive tables of kingdoms, families, genera and species made use of in the sciences. And yet, if it be thought desirable to approximate such an arrangement, we may easily subordinate the division into substantive and adjective law to that which recognizes international, public, and private law, making it a subdivision of private law only, where the distinction is of greatest importance, and ignoring it in both international and public law. Nor will it do any particular violence to practical convenience to subordinate the division into normal and abnormal, to that between substantive and adjective, so as to consider these two as parts of the substantive law, for, while it is true that abnormality⁹ is of importance, as already suggested, in criminal law and as now will be readily seen in procedure, yet in neither of these divisions is it of any such practical consequence as it is in the substantive law.

The adjective law, or, as it may otherwise be called, the remedial law, need not for the present purposes be subdivided. Its description sufficiently indicates that it embraces pleading, practice, evidence, the law of judgments, the measure of damages, and, perhaps, equity. One word of explanation, however, as to equity may be necessary. An arrangement of the law made one hundred years ago would probably have divided the whole private law into two divisions, one of them embracing the rights and procedure recognized in courts of law, the other similarly the rights and procedure recognized in courts of equity. A natural and logical development, however, has so assimilated rights at law and rights in equity that no one would now discuss any branch of the law without combining them, and in many respects they have become indistinguishable. Assimilation in procedure has taken place to some extent, but not uniformly. Some distinction still remains, even where the assimilation is most complete, between methods of trial in what were originally two distinct classes of cases. It is believed, therefore, that what is now peculiarly indicated by the term equity and not properly included under any other branch of the law will be found to relate to the adjective or remedial law, and can be there discussed.

As between normal and abnormal law, the latter may be looked upon as exceptional and the former general, and, therefore, in an institutional treatise it would be advisable to treat the normal first. It has been thought best to preserve this order in our arrangement, but, for the immediate purpose of clearing the ground for subsequent and more difficult classifications, it is advisable to discuss the abnormal branch at once. The peculiarities of persons which render the law as to them abnormal may be those which affect natural persons so as to make their relations to others different from those subsisting between normal persons, or they may be those peculiarities due to the person being artificial or fictitious. The law with reference to natural persons who are not abnormal is not the law of persons at all, for it is not dependent upon the nature of the person, but on the nature of the subject matter, and is, therefore, the law of things. In the use of the term artificial person we have the same conception which is involved in treating a nation in its relation to other nations, or the sovereign power in its relation to its subjects, as a person, and, indeed, the state might be included here under the head of artificial persons were it not that its relations with other states and with its own subjects have necessarily been classified elsewhere. It may be suggested that thus looking at the law of corporations, private or municipal, the discussion of it should be limited to those rules which are peculiar on account of the nature of the person, and not extended to rules belonging to the normal law which are applicable to corporations and natural persons equally, and which do not, therefore, depend in any way upon the nature of the person concerned.

The peculiarities which may render a natural person abnormal may be not the result of voluntary act, as in case of idiocy, or may be the result of voluntary acts more or less directly intended to create the peculiar condition or relation as in the case of husband and wife, parent and child, principal and agent, carrier, innkeeper. Groups of topics thus brought under the law of persons are distinguishable from those placed under the division relating to rights *in personam* hereafter discussed,

by reason of the fact that the abnormal conditions, even though voluntarily created, give rise to rights and duties with relation to persons in general, while rights *in personam*, both contractual and quasi-contractual, exist against certain persons only. For instance, the formation of a partnership depends upon voluntary acts, but it creates a relationship of the partners to persons in general, not merely to some certain persons.

It is evident, therefore, that, while the idea of status is involved in the classification of natural persons under abnormal law, as here suggested, it by no means limits the scope of the division. Indeed, the notion of status has so far disappeared that it has become common, even in statutes, to speak of marriage as a contractual relation instead of a relation arising from status. One branch of the law of status, that of master and servant, has in fact disappeared entirely unless we choose to extend status to cover relations voluntarily assumed. It is believed the arrangement here suggested, that includes in the abnormal law all classes of peculiarities and relations, whether natural or artificial, whether arising voluntarily or involuntarily, which put the persons concerned into relations with persons in general different from those existing between ordinary normal persons, and which are not determined merely by agreement, but are determined by law, will be found not only convenient but theoretically serviceable and consistent; and a class of topics will thus be disposed of which has been considered in a confused way as between property and contract, though not completely covered by either head. For instance, the law of carriers is not a branch of the law of personal property alone nor of the law of contracts alone, but the whole matter that is of importance under that heading depends on rights and duties which the law imposes independently of agreement, arising from the fact that the person assuming to undertake the peculiar business of carrier has received property by virtue of that undertaking. Carriers of passengers are usually considered in discussing the law of carriers, and yet they do not necessarily have possession of any property, and, on the other hand, neither carriers of goods nor carriers

of passengers need have made any contract whatever in order to give rise to the rights and duties which the law imposes upon them. The fact, therefore, that carriers of passengers and carriers of goods have been practically discussed together in entire disregard of the limitations which would be imposed by classifications under which they have usually been arranged indicates that such usual arrangement has been erroneous, and gives countenance to the arrangement which is here suggested that brings them logically under a common classification by reason of peculiar relations toward the public. If further illustration were necessary, it would be found in the subjects of principal and agent, and master and servant. No book will be found treating either one of these subjects without running imperceptibly into the other. Torts of agents under the head of principal and agent include the same kind of torts as torts of servants under the head of master and servant. Under any classification heretofore suggested the two topics are entirely separate, although covering common ground. Under the arrangement here suggested they are side by side. While they ought to be kept distinct in this, that the topic of principal and agent should be limited to discussion of the rights and duties resulting from the attempt of the agent to act for the principal in making contracts, and the topic of master and servant should be limited to the discussion of relations growing out of the acts of the servant for the master otherwise than in making contracts; yet it is believed that the two topics are so analogous that a very close line cannot be drawn between them.

There remains now for consideration the normal, substantive, private law, and we find that further subdivision can be made, either by considering rights and duties as dependent on the nature of the objects with reference to which such rights and duties exist, or with reference to the persons against whom they are available. It must be clearly noticed, however, that the distinction dependent upon the person has no reference whatever to the law of persons, that is, abnormal law; the only question here is, considering that rights and duties pertain to

persons, shall we discuss them as rights and duties pertaining to such persons with reference to objects, or shall we discuss them as rights and duties pertaining to persons as against other persons? There seems to be a classification of the Roman law embodying this distinction, namely, that which divides rights into two classes, *dominium* and *obligatio*: but it is at once apparent that these are not two divisions, but two points of view. For no right can be conceived of which does not exist as a right against some person or persons, and it is almost as difficult to conceive of any right as being one which does not exist with reference to some thing or object, although here the term thing must be used in its broadest sense as an object of a right, which sense, however, is well recognized by the civilians and early English writers and seems only to have been ignored by Blackstone and those coming after him. Either one of these two points of view, then, of the thing with reference to which the right is available, or the person against whom the right is available, would furnish a basis of classification. The effort to use both bases of classification will necessarily lead to confusion unless carefully guarded, and the fact is that not only in theoretical but also in practical arrangements that very confusion has led to no end of trouble. It is this difficulty that has made it impossible to reconcile such practical heads of the law as real and personal property with such others as torts and contracts; the fact being that a class of property cannot be discussed without discussing torts and contracts with relation thereto, nor can torts and contracts be discussed without considering the property to which they relate. It is necessary, therefore, to recognize both of these classifications, endeavoring, however, to so clearly establish their connections that the relations of the topics under each may be at once comprehended, and it is also necessary to determine practically what portion of the field shall be conceded by way of convenience to one form of classification, and what portion to another, so that the topics practically agreed upon shall overlap as little as possible.

Considering the law, then, with reference to the thing or

object involved, all such things or objects may be first divided into those which are specific and those which are not specific; specific things again being divided into tangible and intangible; those tangible being either real property or personal property, and those intangible being such abstractions as patent rights, copyrights, franchises, family rights, contract rights, etc. Contract rights are here included for the reason that there is a marked tendency to regard a purely contractual relation existing between two persons as a right with reference to third persons; for instance, one who has employed a servant acquires not only the right to the services contracted for, but the right to have people in general abstain from interfering with the rendition of such services. This evidently is on the theory that, although as between the parties to the contract the relations are those of agreement merely and the thing involved is in no sense specific, yet as to persons in general a specific right of property has arisen, although its object be intangible. Mere choses in action are not to be classed with intangible objects of rights in any sense except that in which contractual rights in general, as just explained, are included. The thing which characterizes them as property is the power of transfer, but we cannot now recognize mere transferability as an incident peculiar to specific property.

Where the thing or object with reference to which the right exists, or with reference to which a wrong may be committed, is not specific, it has not those characteristics which make its discussion convenient under the head of property. We think of the right to life, to freedom, to health, to reputation, etc., only in connection with some injury or wrong, and, therefore, these rights not specific can best be treated in connection with wrongs relating thereto.

Considering now rights with reference to the person or persons against whom they are available and the correlative wrongs, we find it convenient to divide them according to a long established classification into rights *in rem*, that is, those available against all persons; and rights *in personam*, (or to use the fuller term, *in personam certam*) that is, rights availa-

ble only against certain or determinate persons.¹ The first class may be rights with reference to specific objects, or those not specific, but the point of view here involved is that they are available against the whole world and violations thereof constitute torts. The second class of rights, also, may relate to things specific or not specific, but they arise from contract or quasi-contract, and violations thereof are treated as breaches of contract.

The practical difficulty now to be solved is to determine how far torts or contracts with relation to specific things, whether tangible or intangible, shall be discussed in discussing the kind of property to which they relate, and how far they shall be treated as torts and contracts simply. The whole normal law with reference to any particular kind of property will involve the method of acquisition of such property, rights and wrongs with reference thereto, either of tort or of contract, and the method of devolution of such property. It is probably better to give prevailing weight to the point of view which takes notice of the thing with reference to which the right exists, so far as such thing is specific, and to therefore include under the various kinds of property the discussion of torts and contracts relating thereto, and to limit the titles of tort and contract, respectively, to a discussion of those rights and their correlative wrongs which relate to things not specific. For instance, in discussing the nature of rights which may exist with reference to property, it would be impossible to avoid the discussion of interferences with those rights; for it is, to a considerable extent, by determining what is an

¹ These terms *in rem* and *in personam* are in many ways objectionable. Not only are they terms of a foreign language entirely without meaning to us in themselves, but they are terms of a classification of the civil law much more extended than the divisions which they are here made to represent. Moreover, they suggest analogies which are entirely misleading. Rights *in rem* have no relation to proceedings *in rem*, nor to judgments *in rem*, the latter two terms having apparently some reference to specific property, while a right *in rem* does not involve any such conception. The term *in personam* is equally misleading in its analogies as it would seem to indicate that the rights thus described are in some sense personal or have relation to persons as distinct from the other class, which is in no way true. Nevertheless, the terms taken in the meaning with which they have been used by civilians and also by writers on classification of the common law properly indicate the distinction here intended, and it does not seem practicable to introduce new terms, however desirable a change might be.

unwarrantable interference that the extent of the right itself is established. It is hardly imaginable that real property can be discussed without discussing mining rights, rights to light and air, licenses, and all that class of matter which has relation to the action of trespass; so, under the head of personal property, the nature of the rights which one enjoys in such property can hardly be understood until wrongs thereto, such as conversion, are discussed. It is believed, therefore, that a proper arrangement will place trespass, conversion, and other torts to property under the head of property rather than under the head of torts. Similarly, there are rights arising out of contracts with reference to specific property, such as those involved in leases, mortgages, bailments, warranties, etc., which might be discussed either under the head of property or under the head of contract, but probably will be found to fall more conveniently under the former.

The prominence given to the division of rights into those *in rem* and *in personam*, to the exclusion of any division with reference to the object of the right is doubtless due to the habit of looking at rights from the standpoint of actions. For purely accidental reasons all real actions fell into disuse and personal actions alone remained, that is to say, actions which took cognizance of violations of duty and were concerned with furnishing redress for breach of personal obligation rather than vindicating a property right.

Torts may be arranged in classes according to the rights violated, but the notion of a tort is so simple that no further analysis is necessary here. Rights *in personam*, however, are not so homogeneous. Such a right may arise by contract, in which case the entire obligation is determined by the voluntary agreement of the parties; or it may arise by reason of acts to which the law attaches obligations without regard to the intention of the parties. These latter have been called quasi-contracts, and perhaps no better term is available, but it is unfortunate that a false analogy should thus be recognized which has so long kept the matter in confusion. Looking at law through the medium of common law actions, it was natu-

ral that they should be classed into actions *ex delicto*, and those *ex contractu*, having in mind the general fact that recovery for breach of contract must be had in an action of covenant, or debt, or assumpsit, while recovery of damages for tort must be in one of the other forms of action. This led to the erroneous assumption that, conversely, every obligation for breach of which an action *ex contractu* could be brought was one arising from contract. In thus attempting to extend the subject of contract to cover all cases in which recovery could be had in an action *ex contractu* (especially to include the whole ground covered by that anomalous form of action on the case called assumpsit) the doctrine of implied contract was resorted to, that term being made to cover not merely obligations to which a party had shown his consent otherwise than by words, but also obligations imposed by law not only without regard to, but even contrary to, the will of the party. We shall only keep a clear conception by bearing in mind that rights *in personam* may exist by contract or without contract. Those which are not contractual are still clearly distinguished from rights the violations of which constitute torts by the fact that they exist only as against certain persons, not all persons. By maintaining these distinctions we shall find a proper place for the right to recover money paid by mistake, or received by one person for the benefit of another, and for the right, so far as recognized, to recover compensation for services rendered to another without his request. The assumption that every obligation enforceable in the so-called actions *ex contractu* is an obligation arising from contract has also led to the absurdity of insisting that every judgment is a contract, merely because the action of debt will lie thereon.

The whole law is full of analogies, and branches the most distinct will be found to have marked similarities and relations. It is only by selecting as a basis of classification those relations which seem fundamental and ignoring analogies more superficial that any arrangement which shall bear the test of general use can be made. A few cases of departure from arrangements which have been adopted by some authors may be briefly noticed.

Nothing is said in this classification as to primary and secondary rights. The latter might have been included under rights *in personam*, contracts and quasi-contracts being designated as antecedent, and secondary rights as remedial. But the notion of secondary rights is connected, necessarily, with that of adjective, as distinct from substantive law.

Another analogy frequently recognized brings rights which depend upon abnormal law under the head of rights *in rem* and *in personam*. The right of the husband to the affections and society of the wife is a right *in rem*, violation of which by a third party in alienating the wife's affections or keeping her apart from the husband constitutes a tort. On the other hand, the right of a wife to support is a right *in personam* against the husband, receiving, however, but limited recognition in law. It will be found practically convenient, however, to consider together all rights and obligations depending upon abnormality, whether they be those between parties to a relationship, or those between the parties affected by peculiar relationships or conditions and normal persons, under the abnormal law, and ignoring the distinctions which are so important in normal law. For the purpose of logical completeness, family relations have been mentioned in the table among those intangible, specific things as to which rights may exist, but they can be better discussed in connection with the discussion of those abnormal relations, just as contract relations can be better discussed, not as property, but in connection with rights *in personam*.

All rights, whether considered as property rights or as obligations, *in rem* or *in personam*, may be looked at with reference to whether they are transferable, and if so how, whether during the lifetime of the possessor of the right, or on his death. The disposition in case of death is dependent upon descent, administration and wills, all classed sometimes under the head of probate law, which can best be discussed, it seems, from the standpoint of the peculiar rights and duties owing by and to executors and administrators, and therefore as a part of the abnormal law. But in discussing each class of property,



and rights *in rem* and *in personam*, the question of transfer *inter vivos* and of disposition after death will be incidentally involved.

Appended hereto is a table following the plan of division suggested in this report.

REFERENCES.

The following brief list of authors who have discussed the subject of classification in whole or in part, is probably far from complete. For reasons given in the report, no mention is made of writers who consider only the arrangement of the civil law. The order is substantially chronological.

Hale, Matthew: *The Analysis of the Law*, a tract published after the author's death and often bound with his *History of the Common Law*.

Blackstone, William: *Commentaries on the Laws of England*. See especially Book I, Chap. 1; Book III, Chap. 1; Book IV, Chap. 1.

Austin, John: *Lectures on Jurisprudence*, delivered 1832-4, especially the outline of his proposed course.

Holmes, Oliver Wendell, Jr.: *Articles in American Law Review*, Vol. V., p. 1, and Vol. VII, p. 46.

Digby, Kenelm Edward: *An Introduction to the History of the Law of Real Property*. See appendix to Part I, relating to the place of the law of real property in the English system, where tables are given.

Hammond, William G.: *Introduction to Sandars' Institutes of Justinian*, where Blackstone's classification is discussed. The same subject is much more fully discussed by the same author in the notes to his edition of Blackstone (*Notes to Book I, Chap. 1.*)

Holland, Thomas Erskine: *Elements of Jurisprudence*.

Smith, George H.: The Law of Private Right. An article on "The True Method of Legal Education," by the same author, in the American Law Review, Vol. 24, p. 211, has given rise to some correspondence on the subject of classification. See pp. 874 and 1027 of the same volume, and pp. 317 and 322 of Vol. 25.

Terry, Henry T.: Some Leading Principles of Anglo-American Law.

HYPOTHETICAL CASES IN REAL PROPERTY.

[The following questions call for answers according to the law of Iowa. Peculiar statutory provisions are to be considered in most of them. Of course, by supposing the real property in each statement of facts to be situated in any other state, these questions can furnish an exercise in the law of real property of such state. The student is advised to thoroughly assure himself of the solution the common law would furnish of the facts supposed before considering the effect of statutes applicable to them.]

1. Joseph Hicks, the owner in fee simple of the lands therein described, made and delivered unto George Campeau an instrument in writing, of which the following is an exact copy:

"For the consideration of \$1,600 I hereby convey unto George Campeau the following tract of land in Iowa, namely: The northwest quarter of section number twenty-three of township number eighty north of range number sixteen, west of the 5th P. M.

April 2, 1891.

JOSEPH HICKS."

What estate, if any, passed from Hicks to Campeau by this written instrument?

2. In a deed from C to D of a tract of land in Iowa the *habendum* clause was in these words, "to have and to hold by the said grantee and his heirs forever;" after which the following was inserted: "The estate hereby conveyed is to commence at my death and not before." Provided C owned the fee simple estate in the land, what estate was conveyed by the deed? Was the estate conveyed a vested interest? At what time was the grantee entitled to enjoy the possession of the land? Had the clause inserted been as follows, "this deed is to take effect at my death and not before," what would have passed by the deed? (See *Leaver v Gauss*, 62 Ia., 314.)

3. A deed of real estate in Iowa owned by a married man was executed by both him and his wife as grantors; and it contained a covenant of general warranty purporting to be their joint covenant. Should there be a breach of this covenant would the wife be liable thereon? Provided the wife

were the owner of land in Iowa conveyed by a similar deed executed by her and her husband, would the husband be liable for a breach of the covenant?

4. The husband was the owner of the land conveyed. The deed was executed by both husband and wife and purported to be their joint grant. There was no express relinquishment of the wife's dower or "distributive share." In the event the wife should survive her husband, could she legally claim a distributive share in the land?

5. Land in Iowa owned by a married man was conveyed by a joint deed of the husband and wife; and the warranty therein purported to be the covenant of "the grantors." At the time of the conveyance the land was subject to the lien of a judgment against the husband; and it was subsequently sold to satisfy the judgment. At the time a sheriff's deed was executed the wife was the owner of the certificate of sale, which she had purchased with her own means; and consequently the deed conveyed the land to her. Was the wife estopped from claiming title under the sheriff's deed?

6. A deed similar to the one described in the last paragraph was executed by a married woman and her husband conveying land in Iowa claimed by the former. Their grantee lost the property by the assertion of a title paramount to that claimed by the wife. Was the husband liable to the grantee on the covenant contained in the joint deed?

7. At a time when A was negotiating for the purchase of a quarter section of land in Iowa he executed and delivered to B a deed purporting to convey it. Subsequently A secured the title from the owner. Did the conveyance to A in any way benefit B?

8. Suppose A and his wife had executed the deed mentioned in the last paragraph, and suppose the subsequently acquired title was purchased by the wife with her own money, would B then derive any benefit from the conveyance to the wife?

9. A husband, in writing, relinquished unto his wife all his right of dower, and all right to claim any interest or share as her husband in a certain quarter section of land in Iowa belonging to her, in consideration of his wife's like relinquishment then executed in a quarter section of his land in Iowa. Several years thereafter the wife died. Was the husband's right to a third of his wife's quarter section barred by his relinquishment?

10. Land in Iowa was sold on an execution to satisfy a judgment against the owner, a married man. Could the wife after the death of her husband subsequent to the sale, legally claim dower in the land? Suppose an execution to make the judgment had been issued and levied upon the land before the husband's death, but the sale had not occurred. Then would the wife have a distributive share in the land?

11. A and B, husband and wife, agreed with C in writing, to sell and convey by a joint deed unto C, a certain tract of land in Iowa, comprising forty acres, their homestead. The agreement was not joint, the wife's promise being in one written instrument and the husband's in another. Afterwards when C tendered full payment and performance on his part in compliance with the terms of the agreement, A, in whom the title to the homestead was vested, refused to join his wife in making the conveyance. Was A liable in damages at the suit of C for breach of contract?

12. The title to the homestead of a married man was in him. He owed a debt which had been contracted before the homestead was acquired. To secure this debt he executed a mortgage on the homestead, but in this the wife did not join. Thereafter to secure the debt of a son for a valuable consideration the husband and wife executed a mortgage on the homestead. Which was the better mortgage?

13. A married man, the owner of a homestead not within a town plat, owned a blacksmith shop which was situated on the land embraced in the homestead and was used by him in

the prosecution of his ordinary business. The shop was worth less than two hundred dollars. This man to secure the payment of a loan made to himself executed a mortgage on the shop, the wife not joining in the execution of the mortgage. Was it valid under Iowa law?

14. A mortgaged his land in Iowa to B to secure a debt. B neglected to record it. While negotiations were in progress between A and C for a loan from C to A the fact that B held a mortgage on A's land was made known to C by one holding the office of assessor in the township in which the land was situated. Later C made a loan to A and to secure it took a mortgage on the land which he immediately recorded. Which mortgage was the prior lien as between B and C? Suppose C assigned the debt to D for value, D having no notice of B's mortgage, which was still unrecorded. Which mortgage was prior as between B and D?

15. A desiring to obtain a loan of money from B, who required real estate security, had prepared and certified an abstract of title to lands owned by him in Iowa. This abstract showed that one John James, through whom A derived title, was the grantee of Peter Simon, who had received his title directly from the United States. It also showed that twelve years prior to the making of the abstract James had conveyed the land, but that the record of his deed failed to show whether at that time he was married or single. A could satisfy B that he and his immediate grantor had been in possession of the land claiming title for a period of more than eleven years last past, but he could furnish no evidence that James was unmarried at the time he conveyed the land. Discuss the propriety of B making the loan on the security of a mortgage on that land.

16. A demised by a written lease a certain tract of land in Iowa belonging to him unto B for the term of one year from March 1, 1883, for the yearly rent of four hundred dollars payable quarterly as follows: One hundred dollars March 1, 1883, and one hundred dollars every three months thereafter. With-

out further express agreement B continued the possession and use of the premises through the spring, summer and autumn of 1884, planting, cultivating and gathering crops thereon as in the preceding year. What kind of a tenancy in the land had B after March 1, 1884? Could A recover the possession against the will of B before March 1, 1885? What kind of notice is required in such a case to terminate the tenancy? Provided B failed to pay rent between December, 1883, and October following could A terminate the tenancy prior to March 1, 1885?

17. A, the owner of a tract of agricultural land in Iowa, leased the same for a period of forty years reserving a rent of forty cents an acre per annum therefor. For how long was such lease good?

18. A, a resident of Iowa died the owner of personal property of the value of \$2,000 over and above the amount of his debts, and of thirteen hundred acres of land in Iowa worth \$39,000. His wife survived him. He left no issue. His parents were both dead. By a will he bequeathed this personal property to his wife and devised to her one-half of all his real estate. The residue of his real property he devised to a seminary of learning incorporated and duly qualified to own real estate. Was the latter devise or any part of it valid?

19. B, a married woman owning a tract of land in Iowa, by an oral contract sold it to one unable at the time to make payment. But by consent of the vendor the purchaser took possession. Soon thereafter, before any payment for the land had been made, the vendor went to Europe intending to be away six months. In order that the oral agreement respecting the payment for the land might be conveniently fulfilled, she conveyed the land to her husband to be by him conveyed to the purchaser upon the payment. A judgment then existed against the husband. The purchaser failed to pay, and by agreement with the woman on her return, he released all claim upon the land and surrendered the land to her. Did the judgment against the husband become a lien on the land?

Samuel Hayes.

LIGHT READING FOR LAW STUDENTS.

Law students in search of light reading can find a great mass of interesting matter connected more or less directly with law. There are many novels that have plots turning upon law points; and others describe trials or other scenes interesting to lawyers. Then, again, there are biographies of lawyers and collections of their speeches, collections of anecdotes regarding lawyers, books stating law in a humorous way, books treating history and statesmanship from the lawyer's point of view, and books intended to be interesting introductions to the study of the law. Besides books, there are many pertinent magazine articles, especially in the professional periodicals.

To attempt to give a complete collection of the light reading peculiarly interesting to law students is quite beyond the present purpose, which is simply to call attention to the subject and to give a few of the most obvious items that would have a conspicuous place in a complete enumeration.

Novels peculiarly interesting to lawyers are Warren's *Ten Thousand a Year*, Dickens' *Pickwick*, Dickens' *Bleak House*, George Eliot's *Felix Holt*, Bulwer's *Eugene Aram*, Bulwer's *Paul Clifford*, Scott's *Heart of Midlothian*, Trollope's *Orley Farm*, Reade's *Griffith Gaunt*, Reade's *Hard Cash*, Reade's *A Terrible Temptation*, Haggard's *Mr. Meeson's Will*, Howells' *A Modern Instance*, Eggleston's *The Graysons*, Grant Allen's *What's Bred in the Bone*, Miss Edgeworth's *Patronage*, Miss Green's (Mrs. Rohlf's) *Leavenworth Case*, Mrs. Annie Edwardes' *Archie Lovell*.

Biographies of lawyers are Forsyth's *Cicero*, Campbell's *Lives of the Chancellors*, Campbell's *Lives of the Chief Justices*, Van Santvoord's *Chief Justices of the United States*, Wirt's *Patrick Henry*, Morse's *Jefferson*, Magruder's *Marshall*, Lodge's *Webster*, Harvey's *Webster*, Brown's *Choate*, Neilson's *Choate*, Curtis' *B. R. Curtis*. There are collections of the speeches of Eskine, Curran, Webster, and Choate. Other collections of speeches are Goodrich's *British Eloquence* and Snyder's *Great Speeches by Great Lawyers*.

Many books other than novels contain matter that is interesting to lawyers and that is so far removed from the ordinary contents of law books as to be properly called light reading. Some books of this description are: Besant's *Fifty Years Ago* (chapter 18), Von Ihering's *Struggle for Law*, Ballantine's *Experiences of a Barrister*, Brown's *The Forum*, Foss' *Memories of Westminster Hall*, Polson's *Law and Lawyers*, Bigelow's *Bench and Bar*, Baldwin's *Flush Times in Alabama*, Rogers' *Law of Drinks and Drinkers*, Rogers' *Law of the Road*, Rogers' *Law of Hotel Life*, Proffatt's *Curiosities of Wills*, Valmaer's *Legal Ethics*, Paget's *Judicial Puzzles*, Croke's *Lyrics of the Law*, Croke's *Poems of the Law*, Browne's *Humorous Phases of the Law*, Browne's *Judicial Interpretations*, Browne's *Law and Lawyers in Literature*, Browne's *Short Studies of Great Lawyers*, Davis' *Law in Shakespeare*, Heard's *Curiosities of the Law Reporters*, A'Becket's *Comic Blackstone*, Donovan's *Tact in Court*, Donovan's *Modern Jury Trials*, Harris' *Hints on Advocacy*, Harris' *Illustrations in Advocacy*, Harris' *Before and at Trial*, Forsyth's *Hortensius or the History of Lawyers*, Snyder's *Great Opinions by Great Judges*. Law books that contain passages as interesting as any in the books just now enumerated are Washburn's *Study of Law*, Warren's *Introduction to Law Studies*, Reed's *American Law Studies*, Elliott's *Work of the Advocate*, Wallace's *Reporters*, Ram on Facts, Ram's *Science of Legal Judgment*, Austin's *Jurisprudence* (Mrs. Austin's preface), and Wilson's *History of Modern English Law*.

It would be impracticable to enumerate the books on history and statesmanship. A few that are extremely interesting are Bryce's *American Commonwealth*, deTocqueville's *Democracy in America*, Fiske's *Civil Government*, Bancroft's *History of the Constitution*, Curtis' *History of the Constitution*, von Holst's *History of the Constitution*, Burgess' *Political Science*, Montesquieu's *Spirit of Laws*, Hearn's *Aryan Household* (chapters 17-20), Maine's *Ancient Law*, Maine's *Early Institutions*, Maine's *Village Communities*.

Magazine articles treating directly or indirectly of law are

Law in Romance, 1 *Am. Law Rev.* 477, A Book about Lawyers, 2 *id.* 72, Lord Plunket, 2 *id.* 369, Lord Brougham, 3 *id.* 1, The Erie R. R. Row, 3 *id.* 41, The Erie Railway and the English Stock, 6 *id.* 230, Confinement of the Insane, 3 *id.* 193, James Otis, 3 *id.* 641, Lyndhurst and Brougham, 4 *id.* 253, The Howland Will Case, 4 *id.* 625, Trials of Troppmann and Prince Bonaparte, 5 *id.* 14, The Machinery of Politics, 6 *id.* 255, The Wharton Trial, 6 *id.* 647, The Dartmouth College Case, 8 *id.* 189, The Tichborne Claimant, 8 *id.* 381, Trial of Udderzook, 9 *id.* 18, Lobbying at Washington, 9 *id.* 684, The Ring Suits, 10 *id.* 39, Joel Parker, 10 *id.* 235, The Greville Memoirs, 10 *id.* 39, Reform in Legal Education, 10 *id.* 626, Leading Cases Done into English, 10 *id.* 665, and 11 *id.* 331, and 24 *id.* 305, Rufus Choate, 11 *id.* 1, The Molly Maguire Trials, 11 *id.* 233, The Washington Safe Burglary Conspiracy, 11 *id.* 401, Presidential Elections, 12 *id.* 1, The Court of Star Chamber, 12 *id.* 21, Lord Abinger, 12 *id.* 39, Jeremiah Mason, 12 *id.* 229, The Turf Frauds, 12 *id.* 430, Charles Sumner, 13 *id.* 405, Case of the Diamond Necklace, 13 *id.* 463, D'Auglade's Case, 1 *West. L. J.* 241, Circumstantial Evidence, 1 *id.* 558, What are Lawyers For? 1 *Columbia Law Times*, 1, Hints on Advocacy, 1 *id.* 141, 2 *id.* 135, The Effect of the Norman Conquest on English Law, 1 *id.* 232 and 257, Address by Professor Dwight, 2 *id.* 1, Legal Education at Cambridge, 2 *id.* 94, Contract and Consideration in Roman Law, 2 *id.* 167, Shylock *v.* Antonio, 5 *Alb. L. J.* 193, The Deadly Yew, 41 *id.* 399, The Case of John Van Arsdale, 39 *Century Magazine*, 116, The Circuiteers, 1 *Law Quarterly Review*, 232, Litchfield Hill, 54 *Harper's Magazine*, 514, and numerous articles in the *Green Bag*.¹

These lists can be extended indefinitely. As given, they are long enough to demonstrate that the law student can make

¹ For other articles see Jones' Index to Legal Periodicals. See also Poole's Index to Periodical Literature (ed. 1882), 650, 699-700, 730-732, 739-730, titles "International Law," "Jurisprudence," "Jury," "Justice," "Land," "Law," etc.; First Supplement to Poole's Index (ed. 1888), 233, 240, 247-248, 250-251; Co-operative Index to Periodicals for 1890, 49, 51; Index to Harper's Magazine (ed. 1886), 389, title "Law and Lawyers;" Index to North American Review (ed. 1878), 58, 61-62, titles "Judicial," "Jurisprudence," "Justinian," "Law," "Lawyer."

the thoughts of even his leisure hours bend in the direction of his profession. Whether it is wise to do this extensively, is a question that each student must answer for himself. Certainly the student should read sooner or later a few of the books and articles enumerated, for no educated lawyer can be content to be wholly ignorant of the light literature of the profession.

Eugene Wambaugh.

CASES ON MEASURE OF DAMAGES.

NOMINAL DAMAGES.

- Pindar v. Wadsworth, 2 East, 154.
 Marzetti v. Williams, 1 Barn. & Ad., 415.
 Rolin v. Steward, 14 C. B., 595.
 Flint v. Clark, 13 Conn., 361.
 Cowley v. Davidson, 10 Minn., 392.
 Runlett v. Bell, 5 N. H., 433.
 Bassett v. Salisbury M'f'g Co., 28 N. H., 438.
 Tillotson v. Smith, 32 N. H., 90; 64 Am. D., 355.
 Hibbard v. West. U. Tel. Co., 33 Wis., 558.
 Ashby v. White, 2 Ld Ray., 938; 1 Smith, L. C.,
 *264.
 Seneca R. Co. v. Auburn, etc., R. Co., 5 Hill, 170,
 175.
 Paul v. Slason, 22 Vt., 231; 54 Am. D., 75.

COMPENSATORY DAMAGES.

In General.

- Peltz v. Eichele, 62 Mo., 171.
 Noble v. Ames M'f'g Co., 112 Mass., 492.
 Baldwin v. Western R. Co., 4 Gray, 333.
 Squier v. Gould, 14 Wend., 159.
 Roberts v. Graham, 6 Wall., 578.
 Warner v. Bacon, 8 Gray, 397; 69 Am. D., 253.
 Powers v. Council Bluffs, 45 Iowa, 652; 24 Am R.,
 792.

- Troy v. Cheshire R. Co., 23 N. H., 83, 100; 55 Am. R., 177.
 Fetter v. Beale, (or Veale) 1 Ld Ray., 339 and 692; 12 Mod., 542; 1 Salk., 11.
 Uline v N. Y., etc., R. Co., 101 N. Y., 98; in note 53 Am. R., 123.
 Pond v. Met. El. R. Co., 112 N. Y., 186; 8 Am. St. R., 734.
 Pappenheim v. Met. El. R. Co. (N. Y.), 28 N.E.R., 518.
 Stodghill v. Chicago, B. & Q. R. Co., 53 Iowa, 341.
 Morris v. Council Bluffs, 67 Iowa, 343.

Proximate.

- Vicars v. Wilcocks, 8 East, 1; 2 Smith, L. C., *460.
 Hadley v. Baxendale, 9 Exch., 341.
 Hammer v. Schoenfelder, 47 Wis., 455.
 Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y., 157.
 Squire v. West. U. Tel. Co., 98 Mass., 232; 93 Am. D., 57.
 Smeed v. Foord, 1 El. & El., 602
 Prosser v. Jones, 41 Iowa, 674.
 Herring v. Skaggs, 62 Ala., 180; 34 Am. R., 4.
 Lowery v. West. U. Tel. Co., 60 N. Y., 198.
 Hobbs v. L. & S. W. R. Co., L. R., 10 Q. B., 111; 11 Moak's Eng. R., 181.
 Cin., Ham. & Ind. R. Co. v. Eaton, 94 Ind., 474; 48 Am. R., 179.
 Watson v. Proprietors, 14 Maine, 201; 31 Am. D., 49.
 Ellis v. Hilton, 78 Mich., 150; 43 N. W. R., 1048.
 Bennett v. Lockwood, 20 Wend., 223; 32 Am. D., 532.
 Howard v. Stillwell M'fg. Co., 139 U. S., 199; 11 S. C. R., 500.

Profits.

- Griffin v. Colver, 16 N. Y., 490; 69 Am. D., 718.
 Brit. Col. Saw Mill Co. v. Nettleship, L. R., 3
 C. P., 499.
 Wolcott v. Mount, 36 N. J. Law, 262; 13 Am. R.,
 438; S. C., 38 N. J. L., 496; 20 Am. R., 425.
 Chicago v. Huenheuer, 85 Ill., 594; 28 Am. R. 626.
 Howe Mach. Co. v. Bryson, 44 Iowa, 159; 24 Am.
 R., 735.
 Fleming v. Beck, 48 Penn. St., 309.
 Masterton v. Mayor, 7 Hill, 61; 42 Am. D., 38.
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 Wallace v. Ah Sam, 71 Cal., 197; 60 Am. R., 534.

Interest.

- White v. Miller, 78 N. Y., 393; 34 Am. R., 544.
 Kendrick v. Fowle, 60 Mich., 363; 1 Am. St. R.,
 526.
 Frazee v. Bigelow Carpet Co., 141 Mass., 126.
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 Lincoln v. Claflin, 7 Wall., 132, 139.
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Attorney's Fees.

- Finney v. Smith, 31 Ohio St., 529; 27 Am. R., 524.
 Winkler v. Roeder, 23 Neb., 706; 8 Am. St. R., 155.
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 note).
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- Adams Ex. Co. v. Egbert, 36 Penn. St., 360; 78
 Am. D., 382.
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 Thomas v. R. Co., 62 Wis., 642; 51 Am. R., 725.

Devereux v. Buckley, 34 Ohio St., 16; 32 Am. R., 342.

Ward v. R. Co., 47 N. Y., 29; 7 Am. R., 405.

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True v. Int'l Tel. Co., 60 Me., 9; 11 Am. R., 156.

U. S. Tel. Co. v. Wenger, 55 Pa. St., 262; 93 Am. D., 751.

Postal Tel. Co. v. Lathrop, 131 Ill., 575.

Leonard v. Tel. Co., 41 N. Y., 544; 1 Am. R., 446.

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Pennington v. Tel. Co., 67 Iowa, 631; 56 Am. R., 367.

Gray v. West. U. Tel. Co., (Ga.) 13 S. E. R., 562; 44 Alb. L. J., 332.

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Marston v. Hobbs, 2 Mass., 433; 3 Am. D., 61.

Bickford v. Page, 2 Mass., 455.

Gore v. Brazier, 3 Mass., 523, 543; 3 Am. D., 182.

Prescott v. Trueman, 4 Mass., 627; 3 Am. D., 249.

Sterling v. Peet, 14 Conn., 245.

Pitcher v. Livingston, 4 Johns., 1; 4 Am. D., 229.

Staats v. Ten Eyck, 3 Conn., 111; 2 Am. D., 254.

Royer v. Foster, 62 Iowa, 321.

Breach of Contract to Convey Land.

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Engel v. Fitch, L. R., 3 Q. B., 314; 4 *id.*, 659.

Bain v. Fothergill, L. R., 6 Exch., 59; S. C., (affirmed) L. R., 7 Eng. and Ir. App., 158; 9 Moak's Eng. R., 116.

Baldwin v. Munn, 2 Wend., 399; 20 Am. D., 627.
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 Hammond v. Hannin, 21 Mich., 374; 4 Am. R., 450.
 Plummer v. Rigdon, 78 Ill., 222; 20 Am. R., 261.
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 [Sweem v. Steel, 5 Iowa, 352.
 Hopkins v. Lee, 6 Wheat., 109, 118.
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 D., 394.
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 Alna v. Plummer, 4 Maine., 258.
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 Rand v. White Mt. R. Co., 40 N. H., 79.
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 R., 313.
 Gordon v. Norris, 49 N. H., 376.
 Bartlett v. Blanchard, 13 Gray, 429.
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 753.

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Conversion.—Higher Intermediate Value.

Scott v. Rogers, 31 N. Y., 676.
 Page v. Fowler, 39 Cal., 412.
 Baker v. Drake, 53 N. Y., 211; 13 Am. R., 507.
 Wright v. Bank of Metropolis, 110 N. Y., 237; 6
 Am. St. R., 356.
 Brewster v. Van Liew, 119 Ill., 554.
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Anderson v. Sloan, 72 Wis., 566; 7 Am. St. R., 885.
 Lawrence v. Hagerman, 56 Ill., 68; 8 Am. R., 674.
 Campbell v. Chamberlain, 10 Iowa, 337.
 Plumb v. Woodman, 34 Iowa, 116.
 Lowenstein v. Monroe, 55 Iowa, 82.

Intent.—Mistake.

Woodenware Co. v. U. S., 106 U. S., 432.
 Forsyth v. Wells, 41 Penn. St., 291; 80 Am. D.,
 617.
 Livingston v. Rawyards Coal Co., 5 App. Cas., 25;
 21 Alb. L. J., 442.
 Winchester v. Craig, 33 Mich., 205.
 Blaen Avon Coal Co. v. McCulloh, 59 Md., 403; 43
 Am. R., 560.
 Coal Creek Mining & M'fg. Co. v. Moses, 15 Lea.,
 300; 54 Am. R., 415.
 Ayres v. Hubbard, 57 Mich., 322; 58 Am. R., 361.

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- Terwillinger v. Wands, 17 N. Y., 54; 72 Am. D., 420.
 Swift v. Dickerman, 31 Conn., 285.
 Wilson v. Noonan, 35 Wis., 321.
 Meagher v. Driscoll, 99 Mass., 281.
 Smith v. Holcomb, 99 Mass., 552.
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 McKinley v. R. Co., 44 Iowa, 314.
 Muldowney v. Ill. Cent. R. Co., 36 Iowa, 462.
 Walsh v. R. Co., 42 Wis., 23.
 Dorrah v. R. Co., 65 Miss., 14; 7 Am. St. R., 629.
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 Crawson v. West. U. Tel. Co., 47 Fed. R., 544.
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Peouniary Condition of Defendant.

- Grable v. Margrave, 3 Scam., 372; 38 Am. D., 88.
 Myers v. Malcolm, 6 Hill, 292; 41 Am. D., 744.
 Rowe v. Moses, 9 Rich. L. (S. C.), 423; 67 Am. D., 560.
 Brown v. Barnes, 39 Mich., 211; 33 Am. R., 375.
 Hare v. Marsh, 61 Wis., 435; 50 Am. R., 141.
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Wright v. Bank of Metropolis, 110 N. Y., 237; 6 Am. St. R., 356.

Simpson v. Keokuk, 34 Iowa, 568.

Brant v. Gallup, 111 Ill., 487; 53 Am. R., 638.

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Bixby v. Dunlap, 56 N. H., 456; 22 Am. R., 475.

Pegram v. Stortz, 31 W. Va., 220; 6 S. E. R., 485.

Fay v. Parker, 53 N. H., 342; 16 Am. R., 270.

Boyer v. Barr, 8 Neb., 68; 30 Am. R., 814.

Tisdale v. Kingman (S. Car.), 13 S. E. R., 547; 44 Alb. L. J., 303.

Emlin McClain.

HISTORICAL BIBLIOGRAPHY OF THE STATUTE LAW OF IOWA.¹

PRIOR TO ANNEXATION TO MICHIGAN.

The Territory now the State of Iowa has been under the jurisdiction of the laws of the following governments prior to its being made a part of the Territory of Michigan in 1834.

Until 1804:—France and Spain (as part of the Provinces of Louisiana and Upper Louisiana). Capitals: New Orleans and St. Louis.

¹ Abbreviations used in this article: p. and pp., page and pages; l. and ll., leaf and leaves; t., title page (one leaf); brackets, [], enclose words or figures not on title page but supplied from outside sources; [1] means one page unnumbered by the printer and always the verso of a numbered page; [2] means two pages, both unnumbered, i. e., one leaf printed on both sides, neither of them numbered; 1 l. means a leaf printed on one side only and unnumbered.

Oct. 1, 1804 to July 4, 1805:—District of Louisiana (attached to Indiana Territory). Acts of March 26, 1804 and March 3, 1805. U. S. Stat. at Large, Vol. II, pages 283 and 331. Capital: Vincennes.

July 4, 1805 to Dec. 7, 1812:—Territory of Louisiana. Acts of March 3, 1805 and June 4, 1812. U. S. Stat. at Large, Vol. II, pages 331 and 743. Capital: St. Louis.

Dec. 7, 1812 to Sept. 17, 1820:—Territory of Missouri. Acts of June 4, 1812 and March 6, 1820. U. S. Stat. at Large, Vol. II, page 743, and Vol. III, page 545. State Government of Missouri began on Sept. 18, 1820. Capital: St. Louis.

From Sept. 18, 1820 to June 28, 1834, there was no local government in the territory now the State of Iowa, nor was it attached to or a part of any organized territory.

1834 TO 1836. TERRITORY OF MICHIGAN.

By Act of June 28, 1834, all that part of the territory of the U. S. north of the present State of Missouri and east of the Missouri River and of the White Earth River (now in north-western part of North Dakota), and west of the Mississippi River, was attached to and made a part of the Territory of Michigan, which then covered to the Mississippi River, north of the State of Illinois. U. S. Stat. at Large, Vol. IV, page 701. Capital: Detroit. The Statute Law of Michigan in force during this period is included in the following volumes:

1. The Statutes of 1833, passed by the 5th Leg. Council.
2. Acts 6th Council, 1st Sess., 1834.
3. Acts 6th Council, Extra and 2d Sess., 1834-5.
4. Acts 6th Council, Special Sess., 1835.

These statutes are also to be found in a reprint of the Territorial Laws of Michigan, in 4 vols.

1836 TO 1838. TERRITORY OF WISCONSIN.

By Act of April 20, 1836 (in force July 3, 1836), all the former Territory of Michigan west of the present State of

Michigan, was constituted the Territory of Wisconsin. U. S. Stat. at Large, Vol. V, page 10. Capitals: Belmont (Wis.) and Burlington (Ia.). The Statute Law of Wisconsin in force during this period is included in the above named Michigan Laws and in the following volumes of Wisconsin Laws:

1. Acts 1st Sess. Legislative Ass'y at Belmont. Oct., 1836. Belmont: W. T. James Clarke. 1836. pp. 88.
2. Acts Winter Sess., 1837-8, and Special Sess., June, 1838, in Burlington. Burlington, Iowa: James G. Edwards. 1838. pp. 372.

The Laws of these three sessions were reprinted by the State of Wisconsin in 1867 in 1 volume.

1838 TO 1846. TERRITORY OF IOWA.

By Act of June 12, 1838 (in force July 3, 1838), all the former Territory of Wisconsin west of the Mississippi River and of a line drawn due north from its head waters, was constituted the Territory of Iowa. U. S. Stat. at Large, Vol. V, page 235. Capitals: Burlington, to and including the session of 1840-1; afterwards Iowa City. The Statute Law of Iowa Territory included the above named Michigan and Wisconsin Laws and the following:

IOWA TERRITORIAL LAWS.

1. The Statute Laws.¹ 1st Sess. Leg. Ass'y [Dec. 1] 1838-39. Du Buque: Russell & Reeves. 1839. pp. t. 597[1].
2. Laws [2d] Sess. Nov. 1839[-40]. Burlington: J. H. M'Kenny. 1840. pp. 187.
3. Laws Extra Sess. July, 1840. Burlington: J. H. M'Kenny. 1840. pp. 63.
4. Laws [3d] Sess. Nov., 1840[-1]. Burlington: John H. M'Kenny. 1840-41. pp. 135.
5. Laws 4th Sess. Dec. 1841[-2]. Iowa City: Van Antwerp & Hughes. 1841-42. pp. 150.

¹ The Judges of the Supreme Court probably furnished drafts for many of these laws, see Resolution on p. 517. This vol. is the "Old Blue Book" having been bound with blue paper sides.

6. Local Laws [5th] Session. Dec. 1842[-3].¹ Iowa City: Hughes & Williams. 1843. pp. 128.
7. Revised Statutes [5th] Sess. 1842-3. Iowa City: Hughes & Williams. 1843. pp. viii, 904.²
8. Laws [6th] Sess. 4th Dec. 1843[-4]. Burlington: James Clarke. 1844. pp. xi, 227.
9. Laws Extra Sess. 17th June, 1844. }
Also Laws Reg. [7th] Sess. 5th May, 1845. } [1844-5]
Iowa City: Williams & Palmer. 1845. pp. viii, 159.
10. Laws Annl. [8th] Sess. 1st Dec. 1845[-6]. Iowa City: A. H. & G. D. Palmer. 1846. pp. x, 148.

ISSUES OF THE CONSTITUTIONAL CONVENTIONS.

Journal [and Constitution] of Convention held at Iowa City Oct.[7 to Nov. 1] 1844. Iowa City: 1845. pp. 224.

Constitution adopted by Convention Nov. 1, 1844. [12,000 copies were ordered printed by the Convention, but the compiler has never seen one].

Journal [Constitution and Ordinances] of the Convention held at Iowa City, May [4 to 19] 1846. Iowa City: 1846. pp. 120.

Constitution adopted May 18, and ratified Aug. 3, 1846. [15,000 ordered printed; same remark as above].

1846 TO 1890. STATE OF IOWA.

There were several efforts made to get Iowa into the Union before statehood was finally accomplished. 1st. As early as 1840 an act was passed (July 31st) "to provide for the expression of the opinion of the people as to taking steps for their admission into the Union" (Acts Extra Sess. 1840. p. 46), by a vote at the general election ensuing, but the opinion there given expression was against statehood by a large majority. 2d. On Feb. 16, 1842, an act with a similar

¹ By printer's error 1843 for 1842

² This volume is the "Blue Book," being also bound with blue paper sides.

title was approved (Acts 1841-2, p. 70) which provided that at the next general election the judges at each precinct should "interrogate the several qualified electors when they approached the polls to vote, whether they are in favor or against a convention, to which interrogatory the said elector shall answer simply 'Convention' or 'No Convention.'" Again the "expression of opinion" was decidedly against statehood, as we are told that every one of the seventeen counties gave a majority against it. 3d. The next attempt was more successful so far as the wishes of the people were concerned, and the Act of Feb. 12, 1844 (Acts 1843-4, p. 13), similar in its provisions to that of 1842, resulted in a majority at the April election, 1844, for holding a convention, and at the next general election, in August, 1844, seventy-three delegates were elected from the twenty-five counties then existing. The convention met at Iowa City, on Oct. 7, 1844, and on Nov. 1 adopted a constitution and adjourned. On March 3d, 1845, Congress passed an act admitting Iowa, but only on condition that the boundaries of the state as fixed by the constitution, including what is now southeastern Minnesota as far north and west as the Minnesota river, and a direct line from the mouth of the "Sioux or Calumet" river to a point on the Minnesota river where Mankato now is, be changed so as to give Iowa the present two southern tiers of counties of Minnesota, but making the western boundary a meridian ($17^{\circ}30'$ west from Washington) passing through the present boundary between the counties of Green and Carroll (U. S. Stat. at Large, Vol. V, page 742), and that the people assent to the change at the April election, 1845. But with this proviso attached the people rejected the constitution. 4th. A "re-submission" act was passed, over the veto of the Governor, in June, 1845 (Acts 1845-6, page 31) providing for the usual viva voce vote on the constitution "as it came from the convention" at the general election of August, 1845, and again it was rejected by the slender majority of 422 votes out of nearly 15,000. 5th. An act was passed Jan. 17, 1846 (Acts 1845-6, page 37), providing for the election, at the

April election, of thirty-two delegates for a convention to assemble at Iowa City in May, 1846, to form a constitution which should be voted on by the people at the general election in August, and, if ratified, be presented to Congress. The convention met on May 4th and adopted a constitution on the 18th. It was ratified on August 3d, by a majority of only 456 votes out of about 18,500. The boundaries fixed by this constitution proved acceptable to Congress, which passed an act on Aug. 4th, 1846 (U.S. Stat. at Large, Vol. IX, p. 52), repealing so much of the act of 1845 as related to the boundaries of Iowa and adopting, *verbatim*, the boundaries of the constitution of 1846, which thereby became the boundaries of the State, and by act of Dec. 28, 1846 (U. S. Stat. at Large, Vol. IX, page 117), formally admitted the State of Iowa. But in the meantime an election had been held under proclamation of the Territorial Governor, state officers elected, and the 1st General Assembly convened (Nov. 30). Thus Iowa, like so many other of the admitted States, set the machinery of her State government into full operation before the date of formal admission.

Capitals: Iowa City, to and including session 1856-7. Des Moines since.

LAWS OF THE STATE OF IOWA. REGULAR SERIES.

1. Acts etc. 1st Gen'l Ass'y, 30th Nov., 1846[7]. Iowa City: A. H. Palmer. 1847. pp. t., 11., vii to xiv, 260.
2. Acts etc. Extra Sess. Gen'l Ass'y, 3d Jan., 1848. Iowa City: A. H. Palmer. 1848. pp. 117.
3. Acts etc. Reg. Sess. 2d Gen'l Ass'y, 3d Dec., 1848[-9]. Iowa City: Palmer & Paul. 1849. pp. t., xv to vi, 17 to 235., 11.
4. Acts etc. Reg. Sess. 3d Gen'l Ass'y, 3d Dec., 1850[-1]. Iowa City: Palmer & Paul, State Printers. 1851. pp. t., 5 to 294, 11.

5. The Code, passed at session 1850-1 and approved 5th Feb., 1851. Iowa City: Palmer & Paul, State Printers. 1851. pp. xv, 685[1.]
6. Acts etc. Reg. Sess. 4th Gen'l Ass'y, 6th Dec., 1852[-3]. Iowa City: W. H. Merritt, State Printer. 1853. pp. t., 7 to 240.
7. Acts etc. Reg. Sess. 5th Gen'l Ass'y, 4th Dec., 1854[-5]. Iowa City: D. A. Mahony and J. B. Dorr, State Printers. 1855. pp. xv, 326.
8. Acts etc. Extra Sess. 5th Gen'l Ass'y, 2d July, 1856. Iowa City: P. Moriarty, State Printer. pp. x, 11., 116.
9. Acts etc. Reg. Sess. 6th Gen'l Ass'y, 1st Dec., 1856[-7]. Iowa City: P. Moriarty, State Printer. 1857. pp. xxi, 11., 493.
10. Acts etc. Reg. Sess. 7th Gen'l Ass'y, Jan. [4], 1858. Des Moines: J. Teesdale, State Printer. 1858. pp. xiv, 573. (pp. 507 to 573 Laws 5th G. A. reprinted.)
11. Special Acts etc. Reg. Sess. 8th Gen'l Ass'y, Jan. [9], 1860. Des Moines, Iowa: John Teesdale, State Printer. 1860. pp. xii, 176.
12. Revision of 1860 (including Gen'l Laws of) 8th Gen'l Ass'y. Des Moines, Iowa: John Teesdale, State Printer. 1860. pp. xx, 1160.
13. Acts etc. Extra Sess. 8th Gen'l Ass'y, 15th May, 1861. Des Moines: F. W. Palmer, St. Pr. 1861. pp. iv, 47.
14. Acts etc. Reg. Sess. 9th Gen'l Ass'y [Jan. 13, 1862]. Des Moines: F. W. Palmer, St. Pr. 1862. pp. xii, 11. 288.
15. Acts etc. Extra Sess. 9th Gen'l Ass'y, 3d Sept., 1862. Des Moines: F. W. Palmer, State Printer. 1862. pp. v, [1], 59.
16. Acts etc. Reg. Sess. 10th Gen'l Ass'y [Jan. 1864]. Des Moines: F. W. Palmer, State Printer. 1864. pp. x, 227, [1].

17. Acts etc. Reg. Sess. 11th Gen'l Ass'y [Jan., 1866].
Des Moines: F. W. Palmer, State Printer. 1866.
pp. t., viii, 232.
18. Acts etc. Reg. Sess. 12th Gen'l Ass'y, Jan. 13, 1868.
Des Moines: F. W. Palmer, State Printer. 1868.
pp. xxi, 402.
19. Acts etc. Reg. Sess. 13th Gen'l Ass'y, Jan. 10, 1870.
Des Moines: F. M. Mills, State Printer. 1870. pp.
xxiii, 362.
20. Gen'l and Public Acts Reg. Sess. 14th Gen'l Ass'y,
Jan. 8, 1872. Des Moines: G. W. Edwards, St.
Pr. 1872. pp. xv, [1], 179.
21. Private, Local, and Temporary Acts Reg. Sess. 14th
Gen'l Ass'y, Jan. 8, 1872. Des Moines: G. W.
Edwards, St. Pr. 1872. pp., xix, [1], 152.
22. Acts etc. Adjourned Sess. 14th Gen'l Ass'y, Jan. 15,
1873. Des Moines: G. W. Edwards, St. Pr. 1873.
pp. 31.
23. The Code: passed adj. Sess. 14th Gen'l Ass'y. Des
Moines: G. W. Edwards, St. Pr. [also] R. P. Clark-
son, St. Pr. 1873. pp. xi, [1], 1039.
24. Public Laws 15th Gen'l Ass'y, Jan. 12, 1874. Des
Moines: R. P. Clarkson, St. Pr. 1874. pp. xi, 121, [1].
25. Private, Local, and Temporary Acts Reg. Sess. 15th
Gen'l Ass'y, Jan. 12, 1874. Des Moines: R. P.
Clarkson, St. Pr. 1874. pp. xv, [1] 11., 105, [1], 211.
26. Acts etc. Reg. Sess. 16th Gen'l Ass'y, Jan. 10, 1876.
Des Moines: R. P. Clarkson, St. Pr. 1876. pp. xxiii,
202, 11.
27. Acts etc. Reg. Sess. 17th Gen'l Ass'y, Jan. 14, 1878.
Des Moines: 1878. pp. xiv, 214.
28. Acts etc. Reg. Sess. 18th Gen'l Ass'y, Jan. 12, 1880.
Des Moines: F. M. Mills, St. Pr. 1880. pp. xxv,
258, 11.

29. Acts etc. Reg. Sess. 19th Gen'l Ass'y, Jan. 9, 1882.
Des Moines: F. M. Mills, St. Pr. 1882. pp. xxiv,
231.
30. Acts Reg. Sess. 20th Gen'l Ass'y, Jan. 14, 1884.
Des Moines: Geo. E. Roberts, St. Pr. 1884. pp.
xxviii, 295.
31. Acts etc. Reg. Sess. 21st Gen'l Ass'y, Jan. 11, 1886.
Des Moines: Geo. E. Roberts, St. Pr. 1886. pp. xv,
252.
32. Acts etc. Reg. Sess. 22d Gen'l Ass'y, Jan. 9, 1888.
Des Moines: Geo. E. Roberts, St. Pr. 1888. pp.
xxviii, 279.
33. Acts etc. Reg. Sess. 23d Gen'l Ass'y, Jan. 13, 1890.
Des Moines: G. H. Ragsdale, St. Pr. 1890. pp.
xxiv, 213.

Besides the above, being the regular series of Laws, there were also published the Acts of a legislative body to a certain extent independent of the General Assembly known as the Board of Education, as follows:

ACTS OF THE BOARD OF EDUCATION, 1857-1864.

The board was created by Constitution of 1857, Art. IX, which provides that the 1st Session shall be held in December, 1858.

1st Sess., Dec., 1858.

Acts, etc. Des Moines, 1858. o. pp. 64. 10,000 ordered printed (p. 40). 12 Acts and 7 Resolutions passed.

Journal. Des Moines, 1858. o. pp. 52. 900 ordered printed (Acts p. 37).

Act of General Assembly, March 23, 1858, provides for Sessions Dec., 1859, and every second year thereafter. (Acts 1858, p. 340.)

2d Sess., Dec., 1859.

Acts, etc. 1st and 2d Sessions, Des Moines, 1860. o. pp. 103. 5 Acts passed and 10 (of the 12) Acts of the 1st Session reprinted.

3d Sess., Dec., 1861.

Acts, etc. Des Moines, 1862. o. pp. 64. 10 Acts passed.

Act of General Assembly, March 31st, 1862, fixes next (4th) Session in June, 1864. (Regular Session, 1862, p. 83.)

Abolished by act of General Assembly, March 19, 1864. (Acts 64, p. 53.)

MISCELLANEOUS.

There were also a number of official publications outside of the regular series, of which the following is a partial list:

An Act or Acts relating to Justices and Constables passed at session of 1838-39 and order by the Legislature of 1839-40 printed in pamphlet form by Jas. G. Edwards. (No copy seen by the compiler). Acts 1839-40, p. 159.

The General Laws relating to Supervisors and Township Officers were ordered compiled and printed with Forms by Act of April 2, 1860 (p. 84). (No copy seen by the compiler.)

A Legislative Manual for 1862 was ordered printed at the Extra Sess. of 1861 (p. 37), but said never to have been printed as appropriation was insufficient.

A pamphlet of "Statistics of 9th General Ass'y" was printed, however, pp. 13,[1], 1862.

This list could doubtless be very much extended.

CONSTITUTIONAL CONVENTION OF 1857.

1. Journal of Convention held at Iowa City, Jan. 19, 1857. Muscatine: J. Mahon, 1857. pp. 406, 26.
2. Debates of Convention held at Iowa City, Jan. 19, 1857. Davenport: Luse, Lane & Co. 1857. 2 vols.
3. Constitution adopted March 5, 1857. (No separately printed copy seen by the compiler.)

UNOFFICIAL REVISIONS.

Since the Code of 1873, there have been several editions of the Statutes of Iowa printed at various dates, one series with notes, etc., by Emlin McClain and published in Chicago, and the other edited by Judge Miller and published at Des Moines. As neither is an official publication, though both are "officialized" by the legislature, the compiler has not introduced them in this list.

T. L. Cole.

WASHINGTON, D. C., NOV. 30, 1891.

THE LIBRARY OF THE LAW DEPARTMENT.

THE CLASSIFICATION.

§ 1. **Three Chief Classes of Books.**—The books in the library of the Law Department number about six thousand and may be divided roughly into three classes: text-books, reports of English cases, and reports of American cases. Digests and statutes are ignored by this classification, but they are not sufficiently numerous to be classed by themselves, and for this reason, as well as for the sake of convenience, they are placed with the sets of reports which they supplement.

TEXT-BOOKS.

§ 2. **Text-Books proper.**—About a thousand text-books are kept behind the bar in the east room. They are arranged on the shelves in alphabetical order, according to the mode of citation, that is to say, usually in an order depending upon the names of the authors.

§ 3. **Bound Periodicals. Unbound Reporters.**—Bound periodicals are classed as text-books, with the important exception that bound volumes of the reporters included in the National Reporter System are classed as reports. Unbound reporters and other unbound periodicals are kept behind the bar.

§ 4. **Receipt to Librarian.**—The books behind the bar can be obtained by filing a receipt with the librarian.

§ 5. **Books of Reference.**—Just outside the bar are placed several of the most popular text-books, several encyclopedias of law, and all of the law dictionaries.

§ 6. **The Key to Text-Books and Periodicals.**—In order to ascertain what books treat of any subject, recourse should be had to the topical index in *Souls Lawyer's Reference Manual* or in any law publisher's general catalogue. A key to the articles in law periodicals is furnished by *Jones' Index*.

THE ENGLISH REPORTS.

§ 7. **English Reports alphabetically arranged.**—The English reports are placed in the northern compartment of the west room. They are arranged alphabetically, according to the usual method of citation.

§ 8. **Guide Blocks.**—When a volume does not appear in its proper alphabetical place, its name and a reference to the place where the book stands can be found upon a neighboring block. In this manner the books too large for the ordinary shelves have a place in the alphabetical arrangement; and so, too, do the books that are bound up with others in the collection of reprints known as the *English Common Law Reports*. For example, the block at the end of the letter "B" recites, among other things, that *Brownlow* is placed with the tall books in the northwest corner of the room and that *Bingham* is found in 8 *English Common Law Reports*.

§ 9. **Mode of Citation.**—The student is urged to cite reports according to the method adopted in the arrangement of this library. Thus, *App. Cas.* should not be cited as *L. R. App. nor Ch. D.* as *L. R. Ch.*, nor *Q. B.* as *A. & E. N. S.*, nor *Q. B. D.* as *L. R. Q. B. D.*, nor *T. R.* as *D. & E.* The cases, however, in the *English Common Law Reports* and in other reprints should be cited according to the volume and page of the original report. A generally accepted device for indicating briefly that a case reported in *Ch. D.*, *C. P. D.*, *Exch. D.*, *P. D.*, or *Q. B. D.*, was decided by the court of appeal, is to write the reference thus,—*Ch. Div.*, *C. P. Div.*, etc.

§ 10. **English Digests and Statutes.**—The English digests and statutes are placed near the reports.

REPORTS OF AMERICAN CASES.

§ 11. **American Cases.**—The reports of American cases are in the middle and southern compartments of the west room.

§ 12. **Arrangement of State Reports.**—The library contains substantially all of the cases decided by the courts of last resort of thirty states. The states are arranged in alphabetical order. The reports of each state are arranged as follows: first come the reports of inferior courts, and then come in chronological order the reports of the court of last resort.

§ 13. **State Digests and Statutes.**—After the reports of each state are placed the digests and the statutes.

§ 14. **United States Supreme Court. Other Federal Reports. Federal Statutes.**—The reports of the Supreme Court of the United States are arranged in chronological order. After them are placed the reports of other federal courts and a complete set of the statutes of the United States.

§ 15. **Points as to Connecticut, Indiana, Iowa, and Kansas.**—Kirby, Root, and Day are early Connecticut reports. 1-8 Blackford are early Indiana reports. Morris and 1-4 George Greene precede the Iowa set. McCahon is a Kansas territorial volume.

§ 16. **Points as to Massachusetts, Missouri, and New Jersey.**—The order of the reports of Massachusetts is 1-17 Mass., 1-24 Pick., 1-12 Met., 1-12 Cush., 1-16 Gray, 1-14 Allen, 96-151 Mass. Walker's Chancery and 1-2 Douglass precede the Michigan set. The Missouri Appeal reports contain cases in the St. Louis and Kansas City courts of appeals, which as to many cases are courts of last resort. The early volumes of New Jersey Equity and of New Jersey Law are often cited by the names of the reporters.

§ 17. **Points as to New York.**—Parker's Criminal Reports contain cases from New York courts not of last resort. In New York, law and equity were separated until 1847, when

the code of civil procedure was adopted. The chancery reports are Johnson's Ch., Hopkins' Ch., Paige's Ch., Edwards' Ch., Hoffman's Ch., Clarke's Ch., Sandford's Ch., and Barbour's Ch. The chief common law reports, containing cases in the old supreme court and the old court of errors, which latter was composed of the state senate, the chancellor, and the judges of the supreme court, are Caines, Johnson, Cowen, Wendell, Hill, and Denio. In 1847, simultaneously with the founding of the court of appeals and the introduction of the code of civil procedure, began the series known as New York. 1-4 Keyes are parallel with this series. Some reports of the series are occasionally cited by the reporter's name, but wrongly.

§ 18. **Points as to Ohio and Pennsylvania.**—The series cited as Ohio Reports closed in 1852, when by virtue of the adoption of a new constitution the supreme court began to sit exclusively in bank. The adoption of a code of civil procedure, analogous to the New York code, was nearly coincident with the beginning of the new series of reports called Ohio State. At the beginning of the Pennsylvania reports are placed Aermead, Browne, Brightly, Parsons' Equity Cases, and Grant's Cases, all of which are unofficial. The early volumes of the official series are cited by the name of the reporter. The official series begins with Dallas, whose reports are placed with the United States set. The Pennsylvania reports properly cited by the reporters' names are Addison, Yeates, Binney, Sergeant & Rawle, Rawle, Penrose & Watts, Watts, Wharton, and Watts & Sergeant. The subsequent volumes are properly cited as Pennsylvania State, although citations by reporters' names are frequent.

§ 19. **Points as to Texas, Vermont, and Wisconsin.**—Texas begins with Dallam's Decisions, antedating the admission of Texas as a state. The Texas Appeals reports are a criminal set. The court of appeals has final jurisdiction in criminal cases, and in civil cases has a very limited jurisdiction. There are three volumes of civil cases decided in the court of appeals.

The set called Texas reports gives cases decided in the supreme court. The early Vermont reports are cited by the names of the reporters, N. Chipman, D. Chipman, Tyler, Brayton, Aikens. The Wisconsin set begins with Pinney's reports, which contain some cases decided while Iowa was part of the Territory of Wisconsin.

§ 20. **Points as to Federal Reports.**—The early reports of the Supreme Court of the United States are cited by the names of the reporters, Dallas, Cranch, Wheaton, Peters, Howard, Black, Wallace. The later volumes are cited as United States. The first volume of Dallas consists of cases decided in the state courts of Pennsylvania. The other volumes of Dallas are composed partly of Pennsylvania cases and partly of federal cases. Curtis' Decisions reprint the opinions of the Supreme Court through 17 Howard. The volumes of cases decided in the circuit and district courts of the United States are cited by the name of the reporter or judge. The federal reports for the circuit including Iowa are Miller, Dillon, and McCrary. Beginning with 1880, all opinions filed in the circuit and district courts have been printed in the Federal Reporter.

§ 21. **Reprinted American Cases. American Decisions, American Reports, American State Reports. Myer's Federal Decisions.**—In the American Decisions are reprinted many important cases decided by state courts down to 1869. The important cases from 1869 to 1887 are collected in the American Reports. In 1887 the series of American State Reports began. In Myer's Federal Decisions are found the principal cases decided in the United States supreme court and other federal courts, the cases being arranged according to subjects.

§ 22. **The National Reporter System.**—Beginning with January 1, 1887, all of the cases decided in state courts of last resort and in federal courts have been printed in the reporters of the National Reporter System. Several of these reporters were established before that time. The reporters thus duplicate the

official reports. For recent cases the reporters are the only source of information, as the official reports seldom print cases less than a year old.

§ 23. **Use of the Reprints and of the Reporters.**—Cases decided in states whose reports have not yet been added to the library can often be found in the American Decisions, American Reports, and the reporters of the National Reporter System. A table of the cases reported in the American Decisions and American Reports is given at the end of the third volume of Rapalje's Digest. Tables of the cases in the reporters are given in the Blue Label Book, and in the appropriate volumes of the reporters. When it is desired to know what is the official reference for a case reported in the reporters, recourse can be had to the Blue Label Book or to the tables at the back of the reporters, or to the reference slip pasted inside the front cover of the reporter in which the case is found.

§ 24. **General American Digests.**—Digests of the several sets of reports are placed immediately after the sets to which they belong. The only digest that attempts to cover all American cases is the United States Digest. The volumes of the United States Digest, including the first series and the annual volumes, are placed in the middle compartment of the west room.

HOW TO COLLECT AUTHORITIES.

§ 25. **To Find all of the Cases.**—The only way to collect all of the authorities is to examine the United States Digest (First Series), each of the annual volumes of the United States Digest (New Series and Third Series), the subsequent numbers of the Monthly Digest, the subsequent weekly numbers of all of the reporters, Jacobs' Fisher's Common Law Digest, Chitty's Equity Index, Mews' Supplemental Digest, and the indexes to the recent volumes of the English reports.

§ 26. **To find the best Cases.**—When the wish is not to collect all of the cases, but simply to find a few good authorities, it is usually sufficient to examine Rapalje's Digest of the American Decisions and Reports, the pamphlet digests of the Amer-

ican State Reports, and the Lawyer's Coöperative Digest of the United State Supreme Court Reports. The notes to the American and English Encyclopedia of Law frequently give as many references as are needed. Lawson's Rights and Remedies and the law dictionaries of Anderson, Bouvier, and Rapalje & Lawrence can also be consulted with profit. When one or two authorities have been secured, others can be found by using the tables of cases in the appropriate textbooks.

§ 27. **The Meaning of Abbreviations.**—The meaning of references can be ascertained by examining Soule's Lawyer's Reference Manual or the general catalogue of any law publisher.

§ 28. **The Standing of Reports.**—The value of a volume of reports is best ascertained by examining Wallace's Reporters. The value of any case can be learned by using Bigelow's Overruled Cases, Talbot & Fort's English Citations, and the indexes to digests. The reports of many of the principal states contain, just inside the front cover, reference slips indicating the places where the cases reported in each volume have been cited by the same court.

Eugene Wambaugh.

SEMINARY OF JURISPRUDENCE.

LIST OF TOPICS.

- I. Nature and definition of law; sanction.
- II. Sources of law; expression of the law; codification.
- III. Rights and duties.
- IV. Persons and things; rights "in rem" and "in personam."
- V. Events; acts; intention.
- VI. Possession; ownership.
- VII. Origin, transfer, and termination of rights; succession.
- VIII. Arrangement or classification of the law.

REFERENCES.

The following references will give sufficient clue to the literature of the subject; Austin's Lectures on Jurisprudence; Markby's Elements of the Law; Holland's Jurisprudence; Hammond's Notes to Blackstone's Commentaries; and in general the references given in notes to chapters VII and VIII of Wambaugh's Study of Cases and on page 21 of this number of the Law Bulletin, in connection with the article on Classification of the Law.

Emlin McClain.

HYPOTHETICAL CASES ON CONTRACTS.

*Continued.*¹

51. The plaintiff agreed to work for the defendant for any sum that the defendant could afford to pay for the services. The plaintiff performed services fairly worth \$100, and the defendant was a wealthy man. What sum was the plaintiff entitled to recover? *H*

52. X, a contractor, contracted to make for Y a certain sewer at a certain price. The next day after that contract was made, Z, Y's next-door neighbor, promised to pay X \$100 in case he built that sewer. X built it. What sum could X recover from Z?

53. Change the case by supposing that X, in return for Z's promise, promised Z to make the sewer according to the arrangement with Y. *F*

54. Change the case in the last paragraph by supposing that X did not promise Y to make the sewer, but that Y promised \$100 in case he made it, and that the other facts remain as just now stated.

55. Change the case in the last paragraph by supposing that X did not promise Z to make the sewer, but that Z simply promised X \$100 in case he made it.

¹ Questions 1-50 may be found in Bulletin Number One, pp. 1-7.

56. A lawyer agreed with his client that if the lawyer won a certain case for the client the lawyer should have one-half of the net proceeds of the suit, and that if the lawyer lost the case he was to have nothing and the client was to pay the costs. The lawyer won. His services were fairly worth \$200, but according to the above agreement he would have received \$1,000. If he sued his client, what, if anything, could he recover?

57. A railroad company agreed with a lobbyist that, if he would spend two months in Washington in trying to induce members of congress to vote for a certain bill, the company, on the passage of the bill, would pay him \$10,000. The lobbyist did as agreed. The bill passed. The lobbyist's time was fairly worth \$750. What could he recover? C.

58. Y, a candidate for office, promised X that, if X would make public speeches in Y's behalf, Y would pay him ten dollars for each speech. X made three speeches. What could he recover?

59. Y, whose husband had been sentenced to be hung, promised X, an attorney at law, that if he would procure a pardon from the governor he should have \$2,000. X succeeded in securing the pardon. What sum was he entitled to receive from Y? H.

60. Y and Z were playing cards for money. Y, having lost all he had, borrowed \$200 from X, a bystander, at the same time promising X that X should have not only the \$200 but also one-half of the winnings. Y won \$1,000. How much could X recover from Y? C.

61. You agree with a broker that he shall buy \$100,000 of a certain railroad stock for you, the details of the transaction being that you give the broker \$10,000 as a margin and that you and the broker agree that, whenever you wish to close the transaction, the settlement will be made upon the following basis: The stock will be charged to you as of the day of the beginning of the transaction and at the market price prevailing at the moment of beginning; as of that day you will

be credited with \$10,000, and charged with a commission for the purchase of the stock; as of the day of closing the transaction you will be charged interest on the balance due from you on the day of beginning and a commission for selling the stock, and will be credited with the market price prevailing at the moment of closing the transaction. At the time of closing the transaction there is a balance of \$20,000 in your favor. How much can you recover?

62. X and Y, in Iowa, made a wager on the result of the Ohio election. The stakeholder was Z. X won. What, if anything, was X entitled to recover from Z? *H,*

63. Husband and wife agreed that in six months they would separate and that ten days after the separation the husband should pay to the wife five thousand dollars. They separated as agreed, but the husband did not pay the money. What were the wife's rights? *H*

64. An old gentleman promised his grandson that if the latter would marry a certain young lady he should have two thousand dollars. If the young man married as suggested, could he compel his grandfather to pay the money? *C*

65. Y wished to buy some goods from Z on credit. Z telegraphed to X, Y's father-in-law, asking whether he would guarantee payment. X answered that he would; but when Y received the goods and failed to pay for them, X refused to keep his promise. Z sued X. With what result?

66. X promised Y that, if Y would work for him for six months, he would pay Z a debt due from Y. Y worked as required. If X refused to pay Y's debt, could Y sue him? Could Z?

67. X said to Z, "If you will promise to work for me for the next five years, I will promise to pay you one hundred dollars a month." Z promised, worked for a year, received no wages, and sued. What did he recover?

68. Add to the last case the fact that after Z had worked for six months X wrote to him, "I wish I could pay you one hundred dollars a month as I promised; but the fact is that,

although I thought I should be able to pay that sum for five years, as we agreed, I now find myself unable to pay anything. (Signed) X."

69. X borrowed \$100 from Y and gave Y his promissory note for that amount, payable on demand. Y lost the note, but fifteen years later he found it and brought suit. Could he recover?

70. County bonds were issued in 1860, payable in 1870. In 1869 a holder of some of the bonds died, and in 1880 the bonds were found in a secret drawer in his desk. His administrator immediately brought suit. Could he recover?

71. In 1860 a state treasurer collected ten thousand dollars of the state's money, but did not credit the state with the amount. His term of office ended in 1861. In 1865 the facts were discovered, and in 1880 the state brought suit. Could it recover? C

72. Change the facts of the preceding case by supposing that the official was a township treasurer.

73. In 1879 a young man borrowed \$1,000 from his aunt and gave her his note, payable in a year. She concluded to make him a gift of the money, and accordingly she never demanded principal or interest. She died in 1891. Her administrator wrote to the maker of the note, who answered as follows: "My aunt intended to make me a gift of that note. She often told me so. That is the reason why I never paid principal or interest. As my aunt made me a gift of that note I am not going to pay it; and, besides, I am told the note is outlawed." The administrator brought suit. Could he recover?

Eugene Wambaugh.

MISCELLANY.

Limiting Liability for Servant's Negligence.

That a contract by which a person is relieved from liability for torts which he may thereafter commit is void as against public policy, is stated by text writers,¹ and may be assumed

¹ Cooley on Torts, 687; Bishop on Non-Contract Law, §§ 1074 and 1208.

as self-evident, the question having, it seems, seldom arisen in its simple form.¹ The question of public policy becomes a more doubtful one when the contract is for exemption from liability on the part of a master for torts of servant for which he would otherwise be liable. The obligations assumed by pursuing certain public callings are deemed to be such as to preclude any release from liability for servant's torts as against persons entitled to the benefit of services therein. Thus, such contracts by a common carrier, or by a telegraph company, are generally held invalid as against public policy. Cases of this kind are so numerous that citations are unnecessary. But it is held that a railway company may, by contract with an employe, relieve itself from liability (imposed by statute) for negligence of a co-employe.² It is sometimes suggested that such a limitation will not be recognized in cases of gross, willful, or criminal negligence on the part of servants;³ but there seems to be no good ground for distinguishing in this respect between gross and ordinary negligence, even if such distinction is practicable for other purposes. As between a carrier of passengers and a person who is riding without any compensation, and as to whom, therefore, the duties of a public carrier do not arise, a contract limiting the carrier's liability for negligence of its servants has been frequently upheld.⁴ So where a railway company agreed to haul the cars of a show it was held that the company was not acting as common carrier and that a stipulation in the contract relieving the company from liability for negligence of its servants in connection with such transportation was valid.⁵

¹ See, however, as illustrative, *Roesener v. Hermann*, 8 Fed. R., 782; *Johnson v. Richmond & D. R. Co.*, 86 Va., 975; 8 C., 11 S. E. R., 829.

² *Western, etc., R. Co. v. Bishop*, 50 Ga., 465; *Galloway v. Western, etc., R. Co.*, 57 Ga., 512. These cases are criticised in 2 *Thompson on Neg.*, 1025. *Contra*, see *Kansas Pac. R. Co. v. Reavey*, 29 Kans., 169; *Railway Co. v. Spangler*, 44 Ohio St., 471.

³ *Ill. Cent. R. Co. v. Read*, 87 Ill., 484; *Arnold v. Ill. Cent. R. Co.*, 83 Ill., 373; *Annas v. Milwaukee & N. R. Co.*, 67 Wis., 46; *Memphis, etc., R. Co. v. Jones*, 2 Head, 517.

⁴ *Wells v. New York C. R. Co.*, 24 N. Y., 180; *Austin v. Manchester, etc., R. Co.*, 10 C. B., 454.

⁵ *Bates v. Old Colony R. Co.*, 147 Mass., 265; *Quimby v. Boston & M. R. Co.*, 150 Mass., 365; *Griswold v. Ry. Co.*, 53 Conn., 371; *Kinney v. Central R. Co.*, 38 N. J., 407; *Annas v. Milwaukee & N. R. Co.*, 67 Wis., 46; *Ulrich v. N. Y., etc., R. Co.*, 108 N. Y., 80. *Contra*, *Gulf, etc., R. Co. v. McGown*, 65 Tex., 640.

⁶ *Coup v. Wabash, etc., R. Co.*, 56 Mich., 111.

It seems, therefore, that where there is no peculiar relation between the parties, such a contract is not invalid as against public policy.

Recent Cases.

The Supreme Court of Iowa has lately decided¹ that a chattel mortgage on a crop to be planted, even though no crop is yet in existence when the mortgage is filed for record, is a valid lien as against a purchaser in the market of the grain which is the product of such crop. No authorities are cited in support of this conclusion but the same conclusion has been reached by the Supreme Court of the Territory of Dakota in a case involving exactly the same state of facts.² The Supreme Court of Nebraska has, however, reached a contrary conclusion, apparently giving some force to the English rule as to sales in market overt, and suggesting that the mortgagee was guilty of laches in permitting mortgagor to thus put the grain on the market.³ This line of reasoning is adopted by the supreme court of Iowa in another case between the same parties involving a landlord's lien, and it is said that the landlord who knows that his tenant is putting upon the market grain on which the landlord has a lien, and makes no objection, thereby waives his lien.⁴

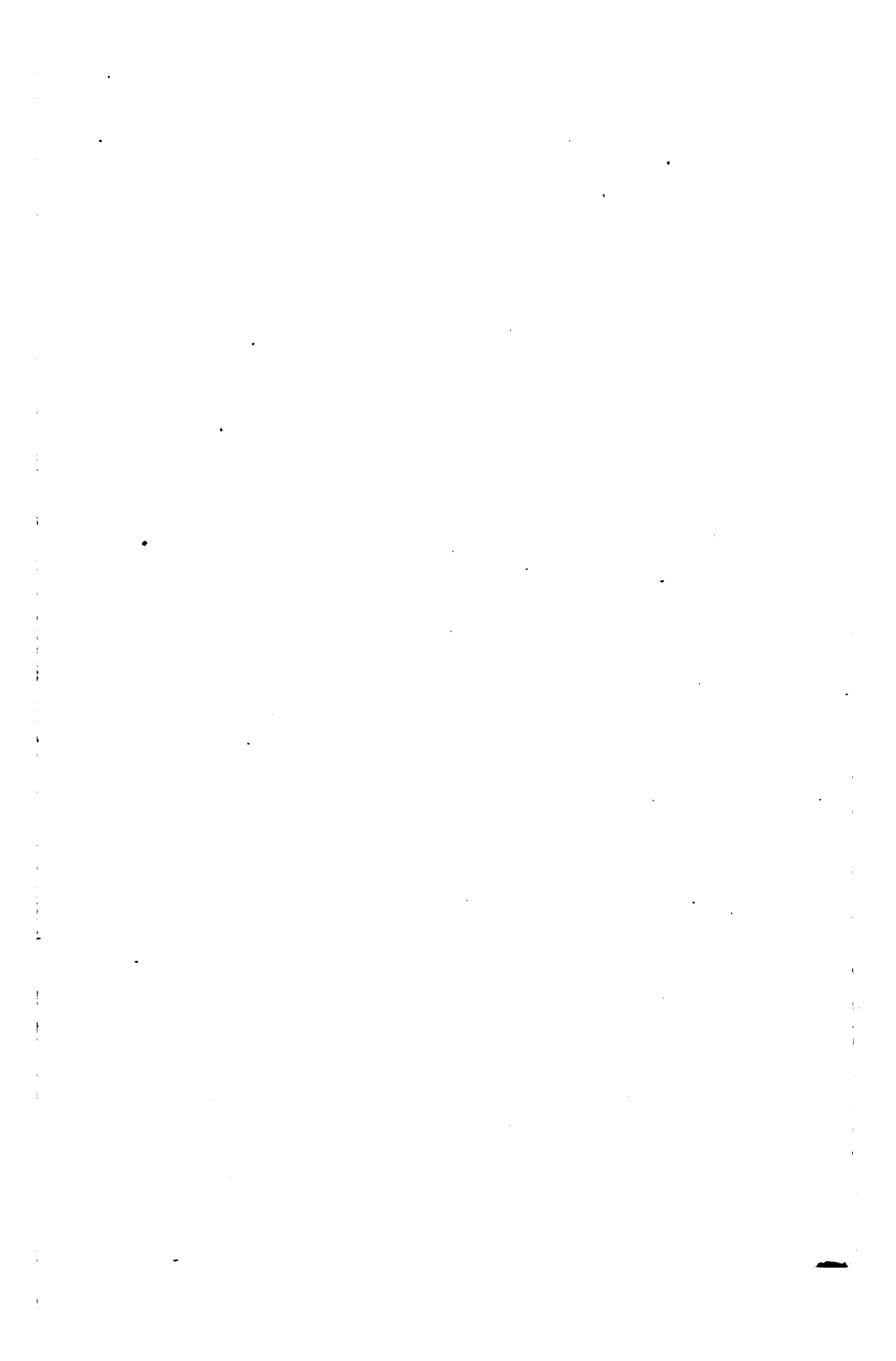
The Supreme Court of the United States holds, in *Union Pac. R. Co. v. Botsford*, 11 S. C. Rep., 1000, that in an action for personal injuries plaintiff cannot on motion of defendant be required, before the trial, to submit to a surgical examination.

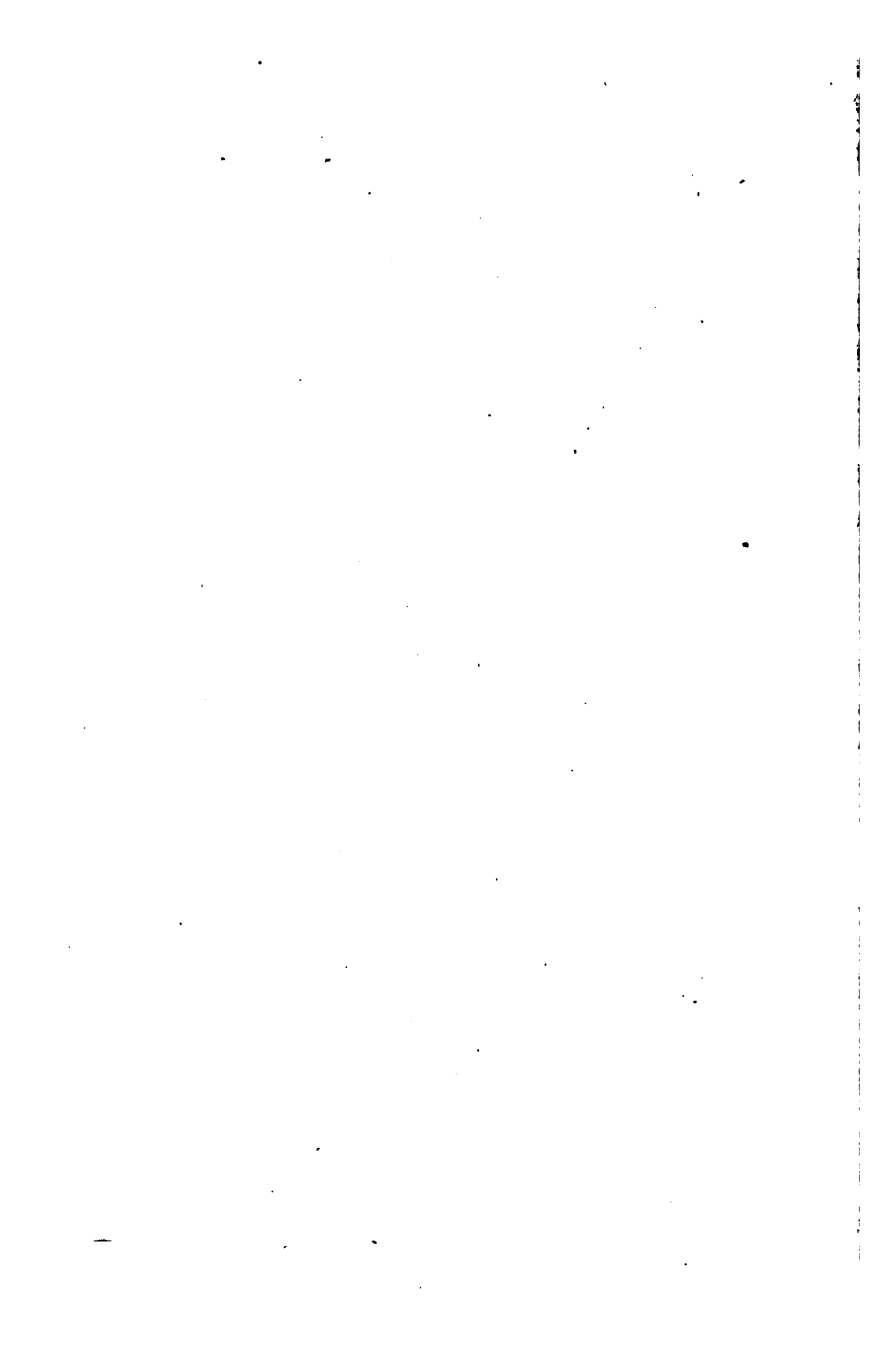
¹ *Wright v. E. M. Dickey Co.*, 49 N. W. Rep., 984.

² *Grand Forks Nat. Bk. v. Minneapolis, etc., Elevator Co.*, 48 N. W. Rep., 806.

³ *Gillilan v. Kendall*, 36 Neb., 82; 42 N. W. Rep., 281.

⁴ *Wright v. E. M. Dickey Co.*, 50 N. W. Rep., 206.





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HYPOTHETICAL CASES IN CRIMINAL LAW
AND PROCEDURE.

1. A husband who had been living with his wife in Massachusetts abandoned her and came to Iowa without giving her opportunity or means to follow him. After remaining in Iowa three years without contributing in any way to the support of his wife he received letters from his relatives in Massachusetts living in the neighborhood of his former home, that his wife had procured a divorce from him on account of abandonment and absence, which she might have done under the facts. He thereupon married again in good faith, believing that such divorce had been procured. Can he be convicted of bigamy under the facts?

2. A, whose business it is to make dies for coining money, medals, etc., is applied to by B to furnish dies for whist counters, to show on one side a reproduction of one face of a United States silver dollar and on the other the name of the whist club; and also another set of dies for similar purposes, showing on one side the reverse face of the United States silver dollar and on the other the name of another whist club.

A suspects an illegal purpose and consults the United States authorities, who direct him to furnish the dies as ordered, which he does. B procures these dies with intention of so uniting them as to coin counterfeit silver dollars, and immediately after their delivery to him he is arrested for making dies for the purpose of counterfeiting. Can he be convicted?

3. A statute of the United States makes it criminal to counterfeit the coin of a foreign country. Is such a statute constitutional?

4. Husband orders wife to go alone to a room in distant part of the house and murder a guest. The wife does so. The husband afterwards goes to the same room and takes the guest's money. What is the criminal liability, if any, of each?

5. A and B, being intoxicated, have an altercation in which A applies opprobrious epithets to B. B goes to another room in the house, gets a loaded revolver, immediately returns to where he left A, not finding him there, seeks him in another place and kills him on sight. What, if any, is B's criminal liability? Will the fact of intoxication affect the degree of guilt?

6. A parent, being intoxicated, beats his child with a heavy stick in such violent manner as to cause death. Can the fact of intoxication be proved by way of reducing the criminal liability, and of what crime can the parent properly be convicted?

7. A crowd having gathered before the home of a newly married couple for a *charivari*, the husband appears and asks them to desist from their noise. The crowd responds with hoots and insults, the noise of firearms, tin pans, etc. The husband re-enters his house and from a window fires with a revolver into the air. The insults and noise continuing, he then fires into the crowd, killing one of the number. What, if any, is his criminal liability?

8. A and B intend to commit larceny and in pursuance of an agreement between them A enters a house, steals goods

and throws them from the window, while B, remaining outside, takes them and carries them away. Is B guilty of larceny or receiving stolen goods?

9. A and B, having entered into a conspiracy to murder C, the act to be committed by B, the latter, in pursuance of the common intent, shoots at C intending to kill him, but by accident kills D. Is A guilty of the murder of D?

10. A wife, having learned that her husband has gone to a foreign land and married without procuring a divorce, takes counsel of a lawyer as to whether that act does not release her from the marriage bonds. Being advised that it does, she herself marries. Can she be convicted of bigamy?

11. A man and woman, one of whom has no knowledge that the other is already married, by way of sport go through the marriage ceremony before a person who plays the part of a minister. Without their knowledge he is in fact a minister and qualified to solemnize marriages. In a state where no license is required and the foregoing described proceedings would constitute a valid marriage if the parties were in earnest and competent to marry, would bigamy be committed?

12. Under a statute making it criminal to sell intoxicating liquors to a minor, would a dealer who sells to a person whom he has reason to believe to be of age, but who is in fact not of age, be punishable?

13. An officer, not having any warrant, attempts in a crowd to arrest A for larceny by picking pockets. No such crime has been committed by any one and the officer is making the arrest only on suspicion, having mistaken A for a notorious pick-pocket against whom the police have been warned. A resists, but finding himself overpowered and being dragged away, shoots and kills the officer. What, if any, is A's criminal liability?

14. A, claiming to be able to cure the sick by secret remedies of his own, but being without any medical skill or

training, is called to treat a sick person, and, in good faith, but by reason of gross ignorance, gives a remedy which is in its nature fatal and causes death. What, if any, is A's criminal liability?

15 As the result of anger caused by insulting words unlawfully spoken by A to B, the latter instantly kills A with a deadly weapon. What, if any, is B's criminal liability?

16 An officer attempting to arrest A for a misdemeanor and being violently resisted by A with blows of his fists, strikes A with his policeman's club. As a result A stumbles and falls, striking his head against a projecting stone and fracturing his skull, from which he dies in a few days. What, if any, is the officer's criminal liability?

17. Change the facts in the case last above so that it is the officer who stumbles and falls by reason of A's blows and is killed by the fall. What, if any, is A's criminal liability?

18. With intent to frighten B, who is a timid woman passing through an unfrequented region at night, A, without intent to commit any crime, springs before her, presents a deadly weapon and threatens to kill her. B instantly dies from fright. What crime has A committed?

19. A and B by mutual consent engage in a fight with the fists. A strikes B a severe blow on the temple which results in B's death. What crime does A commit?

20. A, in attempting to commit suicide by shooting himself with a revolver, accidentally hits and kills B. What crime, if any, has A committed?

21. B, claiming a right which he does not, in fact, have to drive through A's premises where A has erected a fence, commences to tear the fence down. A resists, whereupon B tells him to go away and not interfere and strikes him a light blow with a club, threatening to greatly injure him if he does not desist from interference. A thereupon, with a club, strikes B a blow over the head, causing B's death. What, if any, is A's criminal liability?

22. A young man conceals in fruit and thereby administers to his sweetheart a powder which he has procured from a gypsy, which is represented to him to be not injurious, but effectual as a love powder. As a result of the powder the young woman is made violently sick. What crime, if any, has the young man committed?

23. A, in the attempt to murder B, snaps a revolver which he supposes to be loaded, but which is not loaded. B knows that the revolver is not loaded, and is in no way intimidated. What crime, if any, does A commit?

24. A leaves his coat with B, a tailor, to be repaired. B, with wrongful intent, sells the coat to C. C discovers in the pocket a roll of bills of which B had no knowledge, and appropriates them. What is the criminal liability of B and of C, respectively?

25. The diamond bearing earth in a diamond mine is brought to the surface and spread out to remain exposed to the elements for several months in order that it may be more easily searched for stones. A workman picks up and secretes a diamond which he sees in the earth thus spread out. Is he guilty of larceny?

26. A parrot, for which money has been paid, and for which the owner could secure a considerable price from any regular dealer in such birds, is stolen. Is the act larceny?

27. A, a workman in a tannery where payment is made at so much each for the hides tanned, secretly takes from the store-house of the tannery a number of tanned hides with the intention of turning them in and getting pay for them as being tanned by himself. What, if any, is his criminal liability?

28. The owner of a coal mine is in the habit of paying his workmen by orders upon store-keepers with whom he has an arrangement by which such orders shall be honored. A workman who is not entitled to any pay forges such an order and thereby secures goods from a merchant. Does the act constitute larceny.

29. Personal property levied on by a constable, and held in his possession, is wrongfully taken from him by the owner. What crime, if any, is committed.

30. A's horse is running at large in a pasture and is without right taken therefrom by B, who intends to use him for a day and return him without A's knowledge. While B has the horse in possession, C offers to buy the animal supposing it to belong to B, and B makes the sale and keeps the money. What crime, if any, has B committed?

31. An express agent takes from the safe and appropriates a package of money which is lying there awaiting delivery. What crime is committed?

32. A servant receives a check payable to his master or bearer, which is given in payment of a horse which the servant is authorized to sell for his master. The servant then cashes the check and appropriates the money to his own use. What offense is committed?

33. The master sends a servant with wagon and team belonging to the master, to procure a load of coal. The servant, while returning with the coal, stops at his own house and unloads a portion of the load into the cellar with the intention of keeping it, concealing from the master the fact of such appropriation. What crime, if any, has the servant committed?

34. By mistake a man gives to a boot-black a \$10 gold piece, supposing it to be a quarter, and asking him to give back change after deducting payment for services, and the correct change for a quarter is returned, although the boot-black knows that the coin received is a \$10 gold piece. Is there any criminal liability?

35. A pretends to be the owner of property which actually belongs to B and is in B's possession, and makes sale of it to C, and authorizes C to take it away, which C does without B's consent. Is there any criminal liability on the part of either A or B, and if so what?

36. By fear of violence B compels A to disclose the fact that the latter's money is hidden in an adjoining room. B then feloniously takes it from the place where it is hidden. What crime is committed?

37. Thieves break and enter a storeroom in the night time with intent to steal goods. The storekeeper and family live in the second story of the building, the storeroom and living rooms occupying the whole building. The stairway to the second story is on the outside of the building. What crime do the thieves commit?

38. B attempts to bribe A's servant to let him (B) into A's house at night to steal. The servant communicates the fact to his master who tells the servant to pretend to comply with B's request, in order that after B has thus entered, he may be arrested. This is done. Is B guilty of burglary?

39. Mother and daughter having the same name, it appears that defendant induced the daughter to sign a note which he intended to pass and did pass as the note of the mother. Is defendant guilty of uttering a forged instrument?

40. Would intentionally swearing to false statements in proof of loss made in accordance with the provisions of a policy of insurance, constitute perjury?

41. Where a statute authorizes a city to pass ordinances for the prevention of a class of offenses, and to recover fines imposed under such ordinances by an action in its own name, is a suit brought to recover a penalty under such an ordinance a criminal prosecution?

42. Defendant in an injunction suit under the prohibitory law in Iowa asks release from imprisonment for contempt in violating an injunction on the ground that by the constitution of the United States he can only be punished criminally after conviction by jury. Is his contention sound?

43. By law at the time the crime of murder is committed defendant, who has been indicted for the first degree and sentenced for the second degree on plea of guilty, and has

had such sentence reversed on appeal, cannot again be put on trial for the first degree. This is changed by a constitutional amendment after the commission of the crime but before the first trial. Would it be constitutional to put defendant on trial the second time for murder in the first degree?

44. By statute passed after the commission of a crime the crime is made triable in a different court from that having jurisdiction at the time the crime was committed. Is such statute valid as applicable to the crime already committed?

45. A statute provides that a minor may be confined for a term of years in the reform school on the order of a judge made on application of the parent or guardian with the showing that the minor is incorrigible, such commitment being with the right of the minor to be heard, but without provision for a jury trial or other regular judicial proceedings. Is such a commitment valid?

46. The government of Chili passes sentence of banishment on a political offender and makes a contract with the owner of an English steamer to transport such offender to England. He is accordingly put on board against his will and by the officers of the vessel detained on board until he reaches England, when he is allowed his liberty. Have the courts of England jurisdiction of a prosecution against the officers of the vessel for false imprisonment?

47. Can conspiracy against the government of the United States by citizens of the United States in a foreign country be made criminal by statutes of the United States?

48. The statutes of the United States make the jurisdiction of the federal courts over crimes against the United States exclusive. The national banking act passed by Congress makes it a crime to forge national bank notes. Is such act punishable as forgery under a state law? If the criminal is tried and convicted in the federal courts for such crime can he be again tried therefor in the state courts?

49. A person in Iowa gives a bank for collection a draft

on a commission merchant in New York, accompanied by a forged bill of lading for a car load of wheat, the bill of lading providing for the delivery of the wheat to the order of the person drawing the draft and being indorsed by him to the bank in the same way as the draft is indorsed. The draft and bill of lading are forwarded through a corresponding bank in New York to the drawee, who pays the draft to such corresponding bank and the money is forwarded to the Iowa bank, but the drawee subsequently finding that the bill of lading is forged, garnishes the money in the hands of the Iowa bank before it is paid over to the drawer of the draft. What crime is committed and in what jurisdiction?

50. Under a state constitutional provision guaranteeing trial by jury in criminal cases, is a statute valid which makes offences committed within 500 yards of the boundary line between two counties triable in either county? If in such case defendant is put on trial and acquitted of the offence in the adjoining county to that in which the crime was committed, can he be again tried in the county of the commission of the crime?

51. Where goods are stolen in one state and taken by the thief into another, can he be tried in the latter under an indictment charging the taking, etc., in the former?

52. By force and without legal authority a criminal is brought from another state and arrested here for a criminal offence committed in this county. Can he be legally tried? Can he under such circumstances be legally served with civil process? Can the persons who thus brought him from the other state be properly demanded as fugitives from justice by the governor of the state from which the prisoner was brought?

53. Can a person who is extradited under the usual provisions of treaties be tried in the country to which he is taken for another crime than that for which he is charged in the extradition proceedings?

54. An indictment being presented by the grand jury in open court and duly indorsed and filed, are affidavits of the grand jurors receivable on a motion to quash or set aside the indictment to prove that the requisite number of grand jurors did not concur in the indictment?

55. An indictment charges larceny of "one black horse, of the personal property of A" committed at a date so long prior to the date of the finding of the indictment that the prosecution seems to be barred by statute. Can defendant be convicted under such indictment of a larceny, such as that described in the indictment, committed within the statutory period?

56. There being a constitutional guaranty of the right of trial by jury, would a state statute authorizing a court to try criminal cases without a jury by consent of defendant, be valid?

57. A is indicted for the murder of B. There is proof that B was last seen going out with A in a boat; also that when A was asked on his return alone what had become of B he said they had a quarrel and he threw B overboard and B was drowned. There is also proof that A had B's watch within a few days after they were last seen together and was secreting it. Can A be properly convicted?

58. A assaults B with intent to kill, for the purpose of feloniously taking B's money from his person. Neither the offence of murder nor that of robbery is actually committed. A is put on trial for assault with intent to commit robbery. On the trial no evidence of an intent to rob being introduced, A is convicted of assault and battery. Can he be subsequently put on trial for assault with intent to commit murder in the same transaction?

59. Defendant is indicted for larceny in stealing two ten dollar bank notes properly described and is acquitted. Subsequently he is again indicted for larceny, this time in the stealing of four ten dollar bank notes of the same description

as those named in the first indictment. The time during which the offence charged in the latter indictment might have been committed overlaps the time within which the offence charged in the former indictment might have been committed. Can defendant demur to the second indictment on this ground? Will a plea in the second case of former acquittal be available under the foregoing facts? Will the prosecution be allowed to show by evidence on the trial of the plea of former acquittal that the transaction which it was attempted to prove in the first case was a different one from that which it is sought to prove in the second case?

60. If in a criminal case defendant does not by evidence controvert the proof of commission of the crime, but introduces evidence of insanity at the time the criminal act was done, and such evidence is, in the opinion of the court, wholly insufficient to show insanity, can the court properly direct the jury to render a verdict of guilty?

61. Defendant, having been convicted, on appeal secures a reversal on the ground that the evidence on the trial was wholly insufficient to establish an essential element of the crime charged. Has the prosecution the right to again put him on trial and introduce evidence which shall establish the crime in the particular as to which the evidence on the former trial was insufficient?

62. Where defendant pleads former acquittal, may the state show, for the purpose of defeating the effect of such acquittal, that it was procured by bribery of jurors?

63. Can a prisoner serving a term in the penitentiary be indicted and tried for another crime committed before such imprisonment?

Emlin McClain.

(On the next two pages are tables showing classification of homicide and of sexual crimes.)

TABLE OF HOMICIDE.

Copyright, 1892,
By EMLIN MCCLAIN.

Homicide (*i. e.*, causing the death of a human being by an injury resulting in death within a year and a day).

Non-felonious		Felonious	
Justifiable (in discharge of legal duty)	By an officer executing sentence of death, or by an officer or a private person in making lawful arrest.	Murder (with malice aforethought, express or implied)	In first degree (by statute usually including murder by poison, or by lying in wait, or in commission of certain felonies, or with willful, deliberate and premeditated intent to kill.)
	By any person in preventing a felony.		In second degree (all other murders.)
	By accident or misadventure. In an affray, to save life after retreat, or where retreat is impracticable.		
Excusable (without fault)	By negligence	Manslaughter (without malice aforethought)	In self-defense, chastisement, or arrest, where unnecessary violence is used, without intent to kill.
	In failure to provide support where there is a legal duty to do so. In careless use of dangerous instrumentalities.		In committing a misdemeanor.
	By intentional killing in heat of blood, <i>i. e.</i> under provocation.		By intentional killing in resisting unlawful arrest.
	By committing a felony.		In attempting to cause great bodily harm, or in a riot.
	In resisting legal arrest.		By intentional killing.

TABLE OF SEXUAL CRIMES.

Copyright, 1892,
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1. Sexual connection between man and woman not lawfully married.	Single act criminal	Criminal in man only	Rape	Without actual consent of female	Resistance overcome. By fraud (probably). By taking advantage of insensibility.
Criminal by reason of publicity or repetition	Criminal in either sex (statutory)	Incest, between persons within specified degrees of relationship. Adultery, where one party or both are married. Fornication (not made criminal in all states, except as it is continued, or public).	Seduction, the consent of a chaste woman being procured by artifice or a false promise.	With actual consent, but where there is not capacity to give valid consent	By reason of imbecility. By reason of not having attained age of consent.
Prostitution. (To which are closely allied the crimes of keeping house of ill-fame, or frequenting such house, or leasing premises for such purpose.) Lewdness.	Criminal by reason of publicity or repetition	Within prohibited degree of relationship (constituting incest). Plural marriages (constituting bigamy).	Sodomy. Obscene exposure of person. Obscene publications.	3. Criminal acts allied to sexual crimes but not involving connection with opposite sex.	2. Illegal marriages.

OLD-FASHIONED QUESTIONS ON EQUITY.

[The questions asked in the recitations and examinations of this law school are almost invariably hypothetical cases, resembling, as closely as may be, the problems propounded by clients. Yet when judges and practicing lawyers try to test a student's knowledge, their questions, according to a long-established custom still prevailing in all parts of the United States, ask for definitions and classifications, and for little else. The questions on Equity printed below indicate the sort of review that should be pursued as to all subjects by a student anxious to pass a bar examination brilliantly.]

1. What is equity? (Bispham on Equity, sec. 1.)
2. What is the difference between law and equity? (Sec. 1.)
3. Are courts of equity bound to follow precedents?
4. In this state what courts have equitable jurisdiction?
5. Has a justice of the peace jurisdiction in equity?
6. Give some of the maxims of equity. (Secs. 37-48.)
7. What is a trust? (Sec. 49.)
8. What is the distinction between active trusts and passive trusts? (Secs. 20, 54.)
9. What is the distinction between executed and executory trusts? (Secs. 20, 57.)
10. What is the distinction between public and private trusts? (Secs. 20, 59.)
11. How do equitable interests descend? (Sec. 60.)
12. How are equitable interests alienated? (Sec. 61.)
13. Are equitable interests liable for debts? (Sec. 61.)
14. What are express, implied, resulting, and constructive trusts? (Secs. 20, 63, 78.)
15. Must an express trust be created by writing? (Sec. 64.)
16. What language must be used in order to create an express trust? (Sec. 65.)
17. What is a declaration of trust? (Sec. 67.)

18. What are precatory words? (Sec. 71.)
19. Distinguish between a power, a trust, and a power in trust. (Sec. 77.)
20. What is a charitable trust? (Secs. 116, 120, 124, 125.)
21. Need a charitable trust have certain cestuis? (Sec. 125.)
22. Is a charitable trust objectionable if it tends to create a perpetuity? (Secs. 125, 133.)
23. What is the *cy pres* doctrine? (Sec. 126.)
24. Who may be a trustee? (Sec. 136.)
25. What are the duties of trustees? (Sec. 137.)
26. Can a trustee delegate his authority? (Sec. 145.)
27. What is the responsibility of a trustee for the acts of his co-trustee? (Sec. 146.)
28. What is a mortgage? (Sec. 150.)
29. What is the equity of redemption? (Sec. 151.)
30. Can a mortgagor waive the equity of redemption simultaneously with giving the mortgage? (Sec. 153.)
31. Can a mortgagee buy the equity of redemption (Sec. 153.)
32. How do you determine whether a transaction is a mortgage or a conditional sale? (Sec. 154.)
33. What is foreclosure? (Sec. 156.)
34. What is the doctrine of tacking? (Sec. 159.)
35. Is tacking recognized in this state?
36. What is the doctrine of equity with reference to the assignability of choses in action? (Sec. 164.)
37. Must an assignment be in writing? (Sec. 167.)
38. Is a promise to pay out of a fund an assignment? (Sec. 167.)
39. Is an order on a fund an assignment? (Sec. 167.)
40. According to the law of this state, is a check on a bank account an assignment?

41. Is an assignment valid without notice? (Sec. 168.)
42. Does the assignee of a chose in action take it subject to defenses? (Sec. 170.)
43. Must an assignee sue in the name of his assignor? (Sec. 172.)
44. What is accident? (Sec. 174.)
45. When an instrument is lost, what remedy is there in equity? (Sec. 177.)
46. What is the distinction between a penalty and liquidated damages? (Secs. 178, 179.)
47. What is the equitable doctrine as to forfeitures? (Sec. 181.)
48. What is mistake? (Secs. 184-186, 191.)
49. What are the remedies in case of mistake? (Sec. 184.)
50. What are the rules as to mistakes of law and of fact? (Sec. 187.)
51. What is fraud? (Secs. 197, 198.)
52. What are the remedies as to fraud at law, and what in equity? (Secs. 198, 200, 201.)
53. What are the classes of fraud? (Sec. 205.)
54. Distinguish between actual and constructive fraud. (Sec. 206.)
55. What is undue influence? (Sec. 231.)
56. When are voluntary conveyances void as against creditors or purchasers? (Secs. 243-245, 247-252.)
57. In this state can a debtor give a preference to some of his creditors?
58. What are the kinds of notice? (Secs. 268, 269.)
59. What is notice by *lis pendens*? (Sec. 274.)
60. What is equitable estoppel? (Sec. 282.)
61. What is election? (Sec. 295.)
62. What is equitable conversion? (Sec. 307.)

63. What is contribution? (Sec. 328.)
64. What is exoneration? (Sec. 331.)
65. What is subrogation? (Sec. 335.)
66. What is marshalling? (Sec. 340.)
67. What are the chief remedies in equity? (Secs. 361, 399, 466.)
68. When can specific performance be obtained? (Secs. 364, 368-373.)
69. What are the kinds of injunctions? (Secs. 400, 403.)
70. Give some of the cases in which an injunction can be obtained. (Secs. 406, 410, 413, 427, 429, 431, 435, 438, 444.)
71. When will a court of equity reform a written instrument? (Secs. 468, 469.)
72. What is rescission, and when can it be obtained? (Secs. 472-475.)
73. What is the doctrine of compensation? (Sec. 476.)
74. What is the reason for going into equity in partnership cases? (Sec. 505.)
75. What is a creditor's bill? (Sec. 525.)
76. What is a bill of discovery? (Sec. 557.)
77. What is a bill *quia timet*? (Sec. 568.)
78. What is a bill to perpetuate testimony? (Sec. 573.)
79. What is a bill to remove a cloud from title? (Sec. 575.)
80. When will a court of equity appoint a receiver? (Sec. 576.)
81. What was the reason for the rise of equitable jurisdiction?

Eugene Wambaugh.

THE COURTS OF IOWA.

The present Constitution of Iowa became law in 1857. It was framed for a state already organized and fully supplied with a judicial system. A supreme, a district court and other courts inferior to the district court were then exercising defined powers. The new constitution made void all laws inconsistent with its provisions; but it continued those not inconsistent until they should expire or be repealed.¹ It also authorized the proceedings then pending in any of the courts to be prosecuted to final judgment.² It continued the judges, among others, in office until the expiration of the terms for which they had been chosen.³ The supreme court, as it then existed, consisted of three judges, one chief justice and two associates, chosen by the joint vote of the two houses of the general assembly.⁴ Their term of office was six years, and the incumbents would go out of office on January 11, 1860.⁵ The new constitution established a supreme court of three judges⁶ whose term of office should be six years. These judges were made elective by a vote of the people and were to be so classified that one should go out of office every two years.⁷ The legislature was authorized, however, after the year 1860 to increase or diminish the number of judges of this court.⁸ The constitution fixed the second Tuesday in October, 1859, for the first election of judges to the supreme court.⁹ In pursuance of an act of the seventh general assembly, approved March 23, 1858, three judges were elected at the general election of 1859. This act required such judges, when elected, to determine by lot which of them should go out of office at the end of two years, and which at the end of four, and which should have the full term.¹⁰ The beginning of the term of office of these judges as well as of that of the district judges is fixed by the constitution on January first next after their election.¹¹

¹ Cons. Art. 12, Sec. 2.

² Id. Art. 12, Sec. 2.

³ Id. Art. 12, Sec. 11.

⁴ Cons. of 1846, Art. 5, Sec. 2.

⁵ 10 Iowa, p. V, note 1.

⁶ Cons., Art. 5, Sec. 2.

⁷ Id., Art. 5, Sec. 2.

⁸ Cons., Art. 5, Sec. 10.

⁹ Id., Art. 12, Sec. 8.

¹⁰ Acts 7 Gen. Ass., Chap. 159, Sec. 9.

¹¹ Cons., Art. 5, Sec. 11.

The Hon. Ralph P. Lowe, the Hon. Caleb Baldwin and Judge L. D. Stockton, at the time an associate judge of the old court, were the first judges elected to the new court. The short term fell to Judge Lowe and by consequence he became the first chief justice of the new supreme court.¹ Judge Baldwin obtained the term ending January first, 1866. Judge Stockton's office determined in 1864. These judges qualified January 11, 1860. On the 27th of June, 1860, the Hon. George G. Wright, the last chief justice of the old court, qualified as a member, appointed by the governor to the vacancy occurring by the death of Judge Stockton, and at the general election of 1860 he was elected to fill the unexpired part of the term for which Judge Stockton had been chosen.

The ninth general assembly provided for the addition of a fourth judge to this court.² The statute required the appointment by the governor of a judge to hold office to January 1, 1865, when the "regular term" of a judge to be elected should commence. This new judgeship was to be filled by an election every sixth year after 1864.³ When the present code was prepared the supreme court consisted of four judges so classified that by an election of one each odd-numbered year and one each sixth year after 1864, the full membership was maintained and each judgeship was six years in length. Hence by section 582 the code exactly expressed the law as it stood when the code was submitted to the legislature. The sixteenth general assembly, by an act approved February 11, 1876, again increased, by one member, the supreme court. The office thus created is filled by election at the general election on each sixth year after 1878.⁴

The district court, under the constitution of 1846, consisted of a single judge, who was chosen by the qualified voters of the district for a term of five years.⁵ There were thirteen judicial districts organized in the state when the new constitution was adopted. The judges of these courts were continued

¹ 10 Iowa, p. V

² Acts 9 Gen. Ass., Chap. 23.

³ Id.

⁴ Acts 16 Gen. Ass., Chap. 7.

⁵ Cons. 1846, Art. 5, Sec. 4.

in their office until its natural expiration. The legislature was required by the new constitution to divide the state into eleven districts.¹ The district court provided for consisted of a single judge elected by the people of his district for a term of four years.²

The new constitution empowered the general assembly after the year 1860 to increase or diminish the number of judicial districts, or the number of the judges of the district court, the increase or diminution not to be more than one district or one judge at any one session.³ And by an amendment to the constitution, adopted in 1884, the legislature is authorized at any regular session to increase or diminish the number of judicial districts, and the number of judges of the district courts, as it may deem necessary.⁴ There are at present eighteen districts in the state. Some of them have one judge, some two, some three, and one, the fifteenth, has four judges.⁵ As the state is now divided the county of Polk is a judicial district with three judges. The judges of any district, if necessity or convenience require it, may hold court at the same time at the same place.⁶ The jurisdiction of the supreme court is made appellate by the constitution; but it is subject to such restrictions as the general assembly may prescribe.⁷ The statute denying the right of appeal when the amount in controversy does not exceed one hundred dollars, without a certificate from the trial judge to the effect that the case involves a question on which it is desirable to have the opinion of the supreme court, is an instance of a limitation on this court's jurisdiction validly imposed by the legislature.⁸ The legislature could not clothe it with original jurisdiction, nor establish a tribunal superior to it. The district court is certainly protected by the constitution in its jurisdiction against legislative attempt to strip it of all law powers or all equity powers. It must have legal and equity jurisdiction to remain what the constitution has defined it to be, "a court of

¹ Cons. 1857, Art. 5, Sec. 10.

² Id., Art. 5, Sec. 5.

³ Cons., Art. 5, Sec. 10.

⁴ Amend. Cons., Art. 5, Sec. 10.

⁵ Acts, 21 Gen. Ass., Chap. 131.

⁶ State v. Emmons, 72 Iowa, 265.

⁷ Cons., Art. 5, Sec. 4.

⁸ Andrews v. Burdick, 62 Iowa, 714.

law and equity." The general assembly is empowered, however, to create other courts, "inferior to the supreme court," to share in the judicial power of the state;¹ and in creating such courts it can give them jurisdiction concurrent with the district court,² or jurisdiction to hear appeals from it. The circuit court abolished by the twenty-first general assembly was a court invested during part of its existence with general original jurisdiction concurrent with the district court in all civil actions and special proceedings.³ The twelfth general assembly established a general-term court in each judicial district, consisting of the district judge and two circuit judges, with which each district was by the same act supplied, and made it a tribunal to hear and decide in the first instance all appeals from the district and circuit courts within its own district.⁴ No appeal from the district court while the general term existed, except by passing through it, could reach the supreme court. But it was a court inferior to the supreme court, and therefore constitutional.

The district court has both original and appellate jurisdiction.

The justices of the peace are not guaranteed a permanent share in judicial power. But while these continue to be parts of our judicial system the constitution imposes limitations to their jurisdiction which the general assembly cannot remove. Cases in chancery, and cases where the title to real estate may arise are withheld from the justice of the peace. In other civil cases he has jurisdiction only when the amount in controversy does not exceed one hundred dollars, unless with consent of the parties. If the parties to the controversy consent the court may hear causes involving as much as three hundred dollars.⁵ The legislature clearly could not give the justice authority in excess of these limitations. The limits to their jurisdiction are indispensable, though the courts are not.

The justice of the peace is an inferior court, with only

¹ Cons., Art. 5, Sec. 1.

² *Hetherington v. Bissell*, 10 Iowa, 145.

³ Code, Sec. 162.

⁴ Acts 12, Gen. Ass., Chap. 86.

⁵ Cons., Art. 11, Sec. 1.

original jurisdiction limited to criminal and legal (not equitable) actions.

Since the adoption of the constitution of 1857, a supreme court, a district court, and a justice of the peace, have always formed parts of the judicial system of Iowa. Within that time the legislature has established police and superior courts, a circuit court, and a general term; and it has abolished the county, circuit, and general-term courts. To-day the courts of the state are as follows: The supreme court, the district court, the justice of the peace, the mayor's court, the police court, and the superior court, the last three being provided for only in connection with cities and incorporated towns. The mayor has the jurisdiction of a justice of the peace.¹ Police courts are criminal courts of record in cities of the first class in which no superior court is established, with jurisdiction of violations of city ordinances, and the criminal jurisdiction of a justice of the peace.² Superior courts may be established in cities of seven thousand inhabitants. When established this court has jurisdiction concurrent with the district court except as to probate matters, and actions for divorce, alimony, and separate maintenance, concurrent jurisdiction with justices of the peace, and appellate jurisdiction over the justices of the township in which it sits, and over other justices of the county when the parties consent.³ The mayor has no appellate jurisdiction, nor has the police court.

Samuel Hayes.

¹ Code, Sec. 506.

² Code, Sec. 543.

³ Acts 16 Gen. Ass., Chap. 143, Acts 19 Gen. Ass., Chap. 24, and Acts 23, Gen. Ass., Chap. 40.

MISCELLANY.

Quasi-Contracts.

The difference between contractual and quasi-contractual obligations was recognized and discussed by the Roman jurists. Inst. Just. III, 13 and 27. From Roman law the expression *obligationes quasi ex contractu* was introduced into English law. In the time of Coke and Bacon it is certain that the difference between contracts and quasi-contracts was understood. *Speake v. Richards*, Hobart, 206 (1618), s.c. 1 Keener Cas. Q. C., 1. Yet as the remedies belonging to contracts not under seal were also given to quasi-contracts, the difference appeared to be of no practical importance. Hence the distinction dropped out of the minds of lawyers. Under the designation of implied contracts, quasi-contracts were confused with some genuine contractual obligations. Only recently has it been perceived that implied contracts, so-called, are of two very distinct kinds, quasi-contracts implied as of law and genuine contracts implied as of fact. 1 Keener Cas. Q. C., 21, note 2; J. B. Ames in 2 Harv. L. Rev., 53, 63, 64.

The effort to collect and systematize the doctrines of quasi-contracts began, it seems, with Mr. J. B. Ames, professor in Harvard University, and his former associate, Mr. W. A. Keener, now professor in Columbia Law School. Mr. Keener's two volumes of Cases on Quasi-Contracts are at present almost the only aid to systematic knowledge. A text-book on the subject is being prepared by Mr. Keener. Soon quasi-contracts may become a subject in the courses of most law schools, a subject eventually co-ordinate with contracts and torts.

In 25 American Law Review, 695, Mr. J. H. Wigmore, professor of law in Fukuzawa College, Tokio, has an article entitled, "A Summary of Quasi-Contracts." After the manner of Stephen's Digest of Evidence, the article consists of general propositions and illustrations. The illustrations are chiefly derived from the cases collected by Mr. Keener. The

general propositions are said by Mr. Wigmore to differ materially from the propositions that may be expected in Mr. Keener's text-book.

Recovery of Illegal Interest Paid.

There is a direct conflict in the cases as to whether, aside from statutory provisions (which are usually penal), interest paid in excess of the legal rate can be recovered. By many courts it is said that the usury laws generally are directed against the borrower as well as the lender, and that the parties being both at fault and the usury having been voluntarily paid, no relief will be given.¹ But other courts refuse to look upon the parties as on an equal footing as to the violation of the law, and, regarding the borrower as having practically paid under coercion, allow him to recover illegal interest paid as money had and received by the lender.² In Maine, Vermont, and perhaps other states, recovery of illegal interest paid is expressly authorized by statute, and therefore the decisions in these states do not illustrate the general doctrine. Courts which allow recovery of illegal interest paid as a common law right, regard such recovery as in furtherance of justice rather than as a legal right, and, therefore, although by statute all interest accruing under a usurious contract is forfeited, allow the borrower to recover only the excess of interest paid beyond the legal rate.³

¹ *Shelton v. Gill*, 11 Ohio, 417; *Graham v. Cooper*, 17 Ohio, 805; *Williamson v. Cole*, 28 Ohio St., 207; *Hadden v. Innes*, 24 Ill., 381; *Tompkins v. Hill*, 28 Ill., 519; *Perkins v. Conant*, 29 Ill., 184; *Manny v. Stockton*, 34 Ill., 308; *Carter v. Moses*, 39 Ill., 539; *Woolfolk v. Bird*, 22 Minn., 341; *Nicholls v. Skeel*, 12 Iowa, 300; *Quinn v. Boynton*, 40 Iowa, 304; *Ransom v. Hays*, 39 Mo., 445; *Latham v. Building Ass'n*, 77 N. Car., 145; *Merchant's Bank v. Lutterloh*, 81 N. Car., 142; *Hargrave v. Lewis*, 3 Ga., 162; *Jones v. Joyner*, 8 Ga., 562; *Broadwell v. Lair*, 10 B. Mon., 230; *Reid v. Duncan*, 1 La. Ann., 285; *Spurlin v. Murlikin*, 16 La. Ann., 217.

² *Wheaton v. Hibbard*, 20 Johns., 290; *Thomas v. Shoemaker*, 6 Watts & S., 173; *Philanthropic Building Ass'n v. McKnight*, 35 Penn. St., 470; *Brown v. McIntosh*, 39 N. J. Law, 22; *Willie v. Green*, 2 N. H., 333; *Peterborough Savings Bank v. Hodgdon*, 62 N. H., 300; *State Bank v. Ensminger*, 7 Blackf., 105; *Wood v. Lake*, 13 Wis., 84.

³ *Wheaton v. Hibbard*, 20 N. Y., 289; *Dey v. Dunham*, 2 Johns. Ch., 191; *Fanning v. Dunham*, 5 Johns. Ch., 146; *Palmer v. Lord*, 6 Johns. Ch., 95; *Clarkson v. Gariand*, 1 Leigh, 147; *Zelgler v. Scott*, 10 Ga., 389; *Fay v. Lovejoy*, 20 Wis., 403.

Infant's Liability for Constructive Conversion.

The old difficulty as to whether an infant who obtains property under contract can be held liable therefor in tort, was largely the result of technicalities as to the form of action. Aside from any peculiarities of case, trover, and trespass, there is no reason why an infant should not be liable for injury to property in his possession belonging to another, when such injury is the result of his wrong or negligence, and so the cases hold.¹ On the other hand, his possession being rightful, even though in pursuance of a contract not enforceable against him, he is not liable for injuries to the property not due to his fault. But the difficulty arises in a class of cases where the infant having possession under a contract departs from the contract, and thereupon, but not in direct consequence thereof, or of any fault on his part, the property is injured; for instance, where the infant has hired a horse to drive to a particular place, and then, having driven further, the horse dies from some cause not attributable to the infant's fault. It is said in a number of cases that this departure of the infant from the use stipulated in the contract, constitutes a conversion, and that trover will lie, against which form of action, being in tort, infancy will be no defense.² In the New York and Vermont cases cited in the note preceding the last, the same doctrine is announced, but the facts show a direct injury to the property by the infant. Other courts, however, vigorously object that the tort thus made the basis of the action against the infant is purely constructive, the thing really complained of being the breach of contract, for which, of course, the infant is not liable.³ The doctrine of constructive conversion has been carried very far in Massachusetts.⁴

¹ *Burnard v. Haggis*, 14 C. B., N. S., 45; *Walley v. Holt*, 35 L. T., N. S., 631; *Campbell v. Stakes*, 2 Wend., 137; *Towne v. Wiley*, 23 Vt., 355.

² *Homer v. Thwing*, 3 Pick., 492; *Freeman v. Boland*, 14 R. I., 39.

³ *Jennings v. Rundall*, 8 T. R., 335; *Penrose v. Ourren*, 3 Rawle, 351; *Wilt v. Welsh*, 6 Watts, 9; *Schenk v. Strong*, 4 N. J. Law, 87.

⁴ In *Wheelock v. Wheelwright*, 5 Mass., 104, it is held that where a horse is driven further than contracted for, and dies, but not from any fault of the bailee, case will not lie, but it is said that trover will. So where bailee, having possession under a void Sunday contract of hiring, drove further than agreed, he was held liable for death of the horse without his fault. *Hall v. Corcoran*, 107 Mass., 251.

But it is doubtful whether the authorities in general would support an action of tort against an adult for injury to or loss of property in bailee's hands, during or after a use thereof by him which is wrongful, simply because in violation of the contract under which he has gained possession.

Physical Examination.

The doctrine of the Supreme court of the United States, announced in *Union Pacific R. Co. v. Botsford*,¹ of which note was made in the last number of the BULLETIN, that a court has no power in a civil action for personal injuries, to require plaintiff to submit to a physical examination, has been adopted by the Supreme Court of Indiana² and by the Court of Appeals of New York.³ In the latter state there had been conflicting decisions on the question in the lower courts. The right to order such examination seems to have been first recognized in a court of last resort, in Iowa,⁴ where Judge Beck, speaking for the entire court, rendered an opinion reversing a judgment in such an action on the ground that the lower court had refused to require plaintiff to submit to such examination. This ruling had, before the Supreme Court of the United States passed upon the question, been followed in several states.⁵ What the subsequent course of decision on the question will be, in view of this conflict, it is hard to say.

Recent Cases.

The case of *Baehr v. Clark*, 49 N. W. Rep., 840, (Iowa) is an illustration of the doctrine that one who is, by fraud,

¹ 141 U. S., 250; 11 S. C. Rep., 1000.

² *Penn'a Co. v. Newmeyer*, 34 Cent. L. J., 44.

³ *McQuigian v. Delaware, etc., R. Co.*, 45 Albany L. Jour., 68. The same conclusion has been reached in Illinois. *Parker v. Enslow*, 102 Ill., 273.

⁴ *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375.

⁵ *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kans., 468; *Turnpike Co. v. Bailey*, 37 Ohio St., 104; *Hatfield v. St. Paul & D. R. Co.*, 33 Minn., 130; *White v. Milwaukee City R. Co.*, 61 Wis., 538; *Richmond & D. R. Co. v. Childress*, 82 Ga., 719; *Alabama G. S. R. Co. v. Hill*, 90 Ala., 71, 9 So. R., 30; *Sibley v. Smith*, 48 Ark., 275. In the following cases it is held that under the circumstances in each case it was not error in the lower court to refuse to require plaintiff to submit to such examination, assuming that it would be proper to do so under other circumstances: *Shepard v. Mo. Pac. R. Co.*, 85 Mo., 629; *Sidakum v. Wabash, etc., R. Co.*, 93 Mo., 400; *Owens v. Kansas City, etc., R. Co.*, 95 Mo., 170; *Sioux City & P. R. Co. v. Finlayson*, 18 Nebr., 578; *Stuart v. Havana*, 17 Nebr., 211; *Railway Co. v. Underwood*, 64 Tex., 463; *Mo. Pac. R. Co. v. Johnson*, 72 Tex., 95.

induced to part with possession of his property without intending to transfer title, may follow the property into the hands of an innocent purchaser. The facts were, briefly, that A procured diamonds from plaintiff, who was a regular dealer, on the representation that he had a customer for them. Instead of selling them, however, he first pledged them for a gambling debt, and afterward sold them as his own, using the money to pay off such debt. In an action of replevin it was held that the original owner could recover them from the purchaser.

In *Cribben v. Deal*, 27 Pac., 1046 (Oregon), the question was as to the validity of a deed in which, at the time of signing, sealing, and acknowledging, there had been a material omission. The omission was of the name of the grantee. The grantor subsequently, but before the deed was delivered, by parol authorized a third person to fill in the name of the grantee and to deliver the deed. This was done; and the deed was held valid. In Oregon, seals are not abolished. *Stimson's Am. Stat. Law*, §§ 1564, 4121, 4507. Hence the decision is, as it purports to be, in conflict with the ancient common law rule that authority to fill a blank in a substantial part of a sealed instrument cannot be conferred by parol. By the citation of many authorities the opinion of the court shows that the gradual disappearance of the distinction between sealed and unsealed instruments has been brought about largely by the decisions of the courts..

The right of the widow with reference to the corpse of her deceased husband, is discussed by the Supreme Court of Minnesota, in *Larson v. Chase*, 50 N. W. R., 238, and it is held that there is a right of action on her part against one who wrongfully mutilates such corpse, and that she may recover substantial damage for mental suffering and injury to the feelings resulting therefrom.

Recent Books.

CASES ON CRIMINAL LAW. A Collection of Reported Cases on some of the Leading Heads of the Criminal Law. Prepared for Use in the Law School of Harvard University, by H. W. CHAPLIN. Boston: Little, Brown & Co., 1891. 8vo. Pp. viii. and 511.

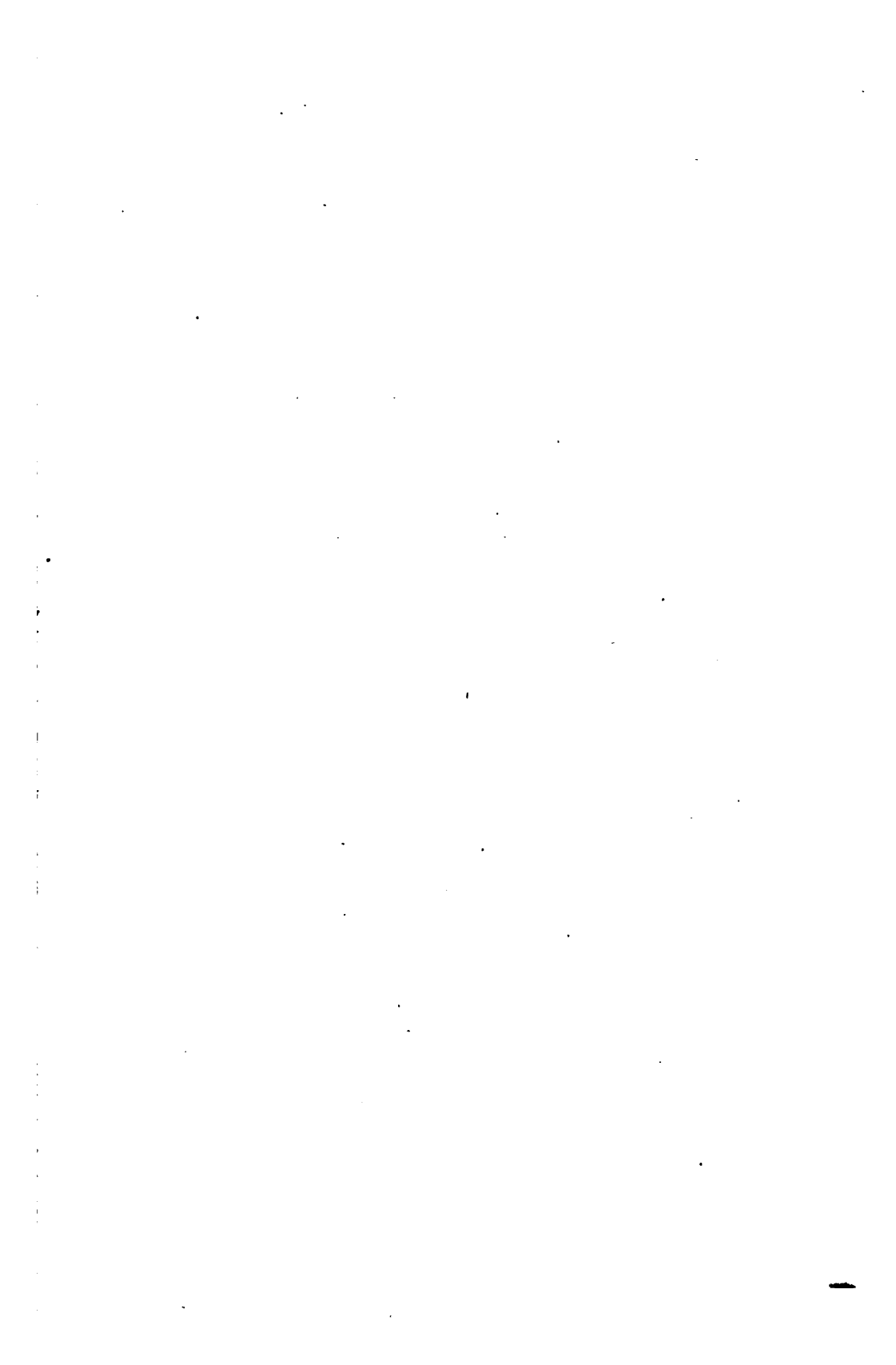
This volume follows the Langdell method. That is to say, it contains no introduction, no head-notes, and no comments. It contains both English and American cases, and is the only collection of criminal cases made for students.

SELECTIONS FROM LEAKE'S ELEMENTS OF THE LAW OF CONTRACTS AND FINCH'S CASES ON CONTRACTS. Arranged as a Text-Book for Law Students, by WILLIAM A. KEENER, Professor of Law, and Dean of the Faculty of Law in Columbia College. New York: Baker, Voorhis & Co., 1891. 8vo. Two volumes. Pp. x. and 1222.

These volumes indicate that at Columbia the Langdell system is modified materially. The student gets his knowledge of the law chiefly from Leake's text, and then finds in the cases from Finch illustrations of the doctrines laid down by Leake. This method is doubtless more rapid than the Langdell method; and consequently one is not surprised to find that, whereas Langdell's Cases on Contracts covers only mutual consent, consideration, and conditions, these volumes cover almost all of the law of contracts. The cases are exclusively English, and are reprinted without head-notes.

LEADING CASES UPON THE LAW OF TORTS. Selected by GEORGE CHASE, LL. B., Professor of Law in the New York Law School, New York City, and Dean of the Law Faculty. St. Paul, Minn.: West Publishing Co., 1892. 8vo. Pp. xxi. and 299.

The cases are English and American. Head-notes are given. There is no summary of the subject; but Professor Chase, in his preface, points out that the cases are intended "to supplement and illustrate the statements of legal principles which are set forth in the various treatises;" and hence there may be no material difference between the plan of this book and the plan of Professor Keener's. Almost every case is annotated with references to other valuable cases.



THE LAW BULLETIN

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NUMBER FOUR

A SYNOPSIS OF THE LAW OF EVIDENCE.

[This synopsis is not intended to take the place of a text-book, nor even to serve as the basis of a course of lectures. It presupposes study of a text-book, attendance upon lectures, and reading of cases, and by way of review attempts to call to the student's mind the chief results of such work. Necessarily, it omits many things. Necessarily, also, it states many doctrines meagerly. For explanations and authorities use must be made of the text-books cited in the notes.¹]

PART I.

INTRODUCTION.

CHAPTER I.

THE SOURCES OF KNOWLEDGE OF FACTS.

§ 1. **Scope of Subject.**—The law of Evidence teaches how knowledge of facts is obtained by courts.²

§ 2. **Possible Sources of Knowledge.**—The possible sources of knowledge are: (1) Consciousness, (2) Perception through the senses (sight, smell, taste, hearing, touch); (3) Information; (4) Reasoning. Memory, of course, is not a source of knowledge.

¹ Abbreviations: Gr., Greenleaf on Evidence; St., Stephen's Digest of the Law of Evidence; Best, Chamberlayne's Edition of Best on Evidence.

² 1 Harv. L. Rev. 142-143.

§ 3. **Not all Sources open to Courts.**—Judges, jurors, and witnesses are not permitted to gain knowledge as to the facts of a case from all of the possible sources of knowledge.

§ 4. **A Witness' Sources of Knowledge.**—In a preliminary and very general way it may be said that a witness must obtain his knowledge of the facts from his own consciousness and perception and, with certain exceptions, not from information (hearsay), nor from reasoning (opinion).

§ 5. **A Juror's Sources of Knowledge.**—A juror must obtain his knowledge of the fact of the case from his own perception of the objects introduced in evidence, and from the information given by the witnesses, and from his own reasoning based upon such perception and information.

§ 6. **A Judge's Sources of Knowledge.**—A judge when passing upon a question of fact must obtain his knowledge just as if he were a juror.

§ 7. **Previous Knowledge of Facts of the Case.**—From what has been said, it is obvious that the tribunal trying a question of fact has no right to take into account such facts as to the case as may be known to the jurors or the judge by means independent of the evidence.

CHAPTER II.

WHAT FACTS NEED NOT BE GIVEN IN EVIDENCE.

§ 8. **Yet Evidence need not be given as all Facts.**—Some facts, however, are known to the tribunal, or are assumed to be known, even in the absence of evidence. Such are (1) facts admitted in the pleadings,¹ (2) facts admitted in open court,² (3) facts of which the judge takes cognizance by virtue of the doctrine of judicial notice,³ (4) facts within the knowledge possessed by jurors as men of common intelligence, and (5) facts included within presumptions, whether those presumptions be the so-called conclusive presumptions of law

¹ St. art. 60.

² St. art. 60.

³ 1 Gr. §§ 4-6; St. arts. 58-59; Best, § 253, n. 1; 3 Harv. L. Rev. 285.

(*praesumptiones juris et de jure*), or disputable presumptions of law (*praesumptiones juris*), or the argumentative conclusions called presumptions of fact (*praesumptiones facti*).¹

CHAPTER III.

THE KINDS OF EVIDENCE.

§ 9. **Kinds of Evidence.**—Considered with reference to the vehicle of communication with the court, evidence is oral, documentary, and immediate.

§ 10. **Oral Evidence.**—Oral evidence is testimony given by witnesses. It includes testimony given in open court, and also testimony that has been taken by deposition. Oral evidence is (1) original (based on consciousness or perception), (2) derivative (based on information) or (3) opinion (based on reasoning).

§ 11. **Documentary Evidence.**—Documentary evidence consists of statements made in writings.

§ 12. **Immediate Evidence.**—Immediate evidence, sometimes called real² evidence, is furnished when the jurors, instead of receiving their knowledge through the medium of testimony or of documents, receive their knowledge as witnesses receive theirs, that is to say, by the exercise of their own powers of observation.³ Examples of real evidence are deductions drawn by jurors from the personal appearance of the witnesses,⁴ or from the appearance of things produced in court,⁵ or from a view of the premises,⁶ or from experiments made in court.⁷

¹ Best, § 296, n. 1; 3 Harv. L. Rev. 141.

² Because knowledge is furnished by the thing itself, *res*, and not through the medium of testimony. Best, § 196, n. 1.

³ Best, § 196, n. 1.

⁴ 2 Evans' Pothier on Obligations, 223; Best, § 196, n. 1.

⁵ Best, § 196, n. 1; Thompson on Trials, §§ 850-872.

⁶ Rapalje's Crim. Proc. § 224; Thompson on Trials, §§ 875-916. And see Iowa Code, §§ 2790, 4432.

⁷ Note in 49 Am. Rep. 191.

PART II.

THE RULES AS TO ADMISSIBILITY.

CHAPTER IV.

RELEVANCY.

§ 13. **What is Relevancy?**—Any fact from which, taken by itself or in connection with other facts, one would draw even the slightest inference as to the existence or non-existence of any other fact, is logically relevant, in case the existence or non-existence of that other fact is the thing to be proved.¹

§ 14. **First Principle. Irrelevant Matter Inadmissible**—Whatever is logically irrelevant is inadmissible.²

§ 15. **Second Principle. Relevant Matter Admissible**.—Whatever is logically relevant is admissible unless rendered inadmissible by one of the exclusionary rules.

§ 16. **Exclusionary Rules**.—The general basis for the exclusionary rules is the fact that certain kinds of evidence, though logically relevant, are of slight weight, or are likely to consume too much time, or are forbidden by statute, or are privileged communications on account of public policy. In the approximate order of their importance the exclusionary rules are: (1) Hearsay, (2) Opinion, (3) Character, (4) Another transaction, (5) Secondary evidence of contents of documents, (6) Parol evidence excluded by statute, (7) Parol evidence varying solemn documents, (8) Privileged matters, (9) Evidence of incompetent witnesses, (10) Evidence too remote.

CHAPTER V.

HEARSAY.

§ 17. **The Hearsay Rule**.—A fact cannot be proved by showing that it was asserted by any person.³

§ 18. **Application of the Rule to Documents**.—Obviously the rule excludes a witness who heard a person state the fact that is to be proved. It excludes also a document stating the fact.

¹ St. art. 1; Best, § 251, n. 1.

² 3 Harv. L. Rev. 144-145.

³ Best, § 492, n. 1; 1 Gr. § 98; St. art. 14.

In other words, a document is here treated precisely as if it were a witness. Just as the words of the person who orally states a fact are impressed upon the memory of a witness, so the words of the person who makes a written statement are impressed upon the document. The witness and the document alike say what they were told.

§ 19. **Limitations upon the Hearsay Rule.**—The hearsay rule is limited by the following subordinate rules, which are not exceptions to the hearsay rule, but are applications illustrating the principles underlying it. These limitations may be thus classified: (1) Words as facts, (2) Words as showing intent, (3) Words showing emotion.

§ 20. **Words as Facts.**—When the thing to be proved is that certain words were uttered, the evidence of any person who heard the words is admissible. This is the case when one wishes to prove that slanderous words were spoken, or that a verbal contract was made, or that a verbal notice was given, or that a verbal threat was made.

§ 21. **Words showing Intent.**—When the thing to be proved is the intention with which a certain act was done, evidence is admissible of words spoken by the actor, if contemporaneous with the act and indicative of the intention. An instance is language indicative of the intention with which a person takes or retains possession of property.

§ 22. **Words showing Emotion.**—When the thing to be proved is mental or bodily feeling, for example, pain, evidence is admissible of statements and exclamations made by the person whose feelings are in question, if contemporaneous with such feelings and indicative of their existence or locality.

§ 23. **Res Gesta.**—The limitations contained in the three preceding paragraphs are sometimes jumbled together and treated as instances of a rule that words constituting part of the transaction, *res gesta*, are admissible. The so-called *res gesta* rule includes in its boundaries a genuine exception to the hearsay rule, as will be pointed out below.¹

¹ See § 26. See also St. Appendix, note V.

§ 24. **Words how Proved.**—In all cases in which words can be proved, the evidence that is admissible is the evidence of any one who heard the words. If the words were, so to speak, uttered in a document, the words are proved by producing the document, unless secondary evidence be admissible.¹

§ 25. **Exceptions to the Hearsay Rule.**—The exceptions to the hearsay rule will be discussed under the following heads: (1) Contemporaneous exclamatory narrations, (2) Books of account, (3) Admissions, (4) Confessions, (5) Former testimony, (6) Declarations in course of business, (7) Declarations against interest, (8) Dying declarations as to cause of death in homicide cases, (9) Declarations as to pedigree, (10) Declarations as to matters of public or general interest, (11) Declarations of testator as to lost will.

§ 26. **First Exception to Hearsay Rule. Contemporaneous Exclamatory Narrations. Res Gesta.**—When the thing to be proved is the cause of an accident, statements made almost contemporaneously with the accident and declaratory of its cause may be proved according to most of the recent authorities. The theory is that, as there is no time for reflection the words are unpremeditated, resembling mere exclamations. The result, however, is that narrative matter is admitted; and hence this is a real exception to the hearsay rule. It is usually treated as part of the rule admitting words that are part of the *res gesta*.²

§ 27.—**Second Exception to Hearsay Rule. Books of Account.**—Entries in a book of account, even though introduced in behalf of the person who made them, are admissible, provided (a) the book be one of regular and continuous accounts, and provided (b) the book be one of original entries, and provided (c) the entries be made almost contemporaneously with the transactions recorded, and provided (d) the book and the entries be verified by the oath of the person who made the

¹ See § 52.

² 1 Gr. § 102; Best, § 495, n. 1. See § 23.

entries, or be supported, in case of his death or inaccessibility, by proof of his handwriting.¹

§ 28. Third Exception to Hearsay Rule. Admissions.—Evidence of statements made by a party to a suit is admissible against him, and so is evidence of statements made by his agent, or by any one under whom he claims by descent or purchase or other mode of succession; but evidence of the statements of an agent is admissible only if the statements were made within the scope of his authority, and evidence of statements made by a predecessor in interest is admissible only if the statements were made with reference to and during the continuance of, that interest.²

§ 29. Fourth Exception to Hearsay Rule. Confessions.—In a criminal case, evidence of the accused person's confession of guilt is admissible against him, provided some person in authority as to the case did not procure the confession by some threat or promise with reference to the case.³

§ 30. Fifth Exception to Hearsay Rule. Former Testimony.—Evidence is admissible of testimony⁴ given at a former trial; provided (a) the witness who gave the testimony be now dead or insane or unable to travel or kept out of the jurisdiction by the adverse party,⁵ and provided (b) the questions at issue in the two trials be substantially identical, and provided (c) the person against whom the evidence is now offered, or his predecessor in interest, had an opportunity to cross-examine the

¹ 1 Gr. §§ 117-119; Best, § 508, n. 1. Compare Iowa Code, § 3658. Greenleaf treats such entries as part of the *res gesta*.

² Best, § 519, n. 1; 1 Gr. §§ 169-212; St. arts. 15-20. Except in criminal cases, an admission is admissible even though extorted by threats and promises. 1 Gr. § 193. *Quære* as to actual duress.

³ Best, § 551, n. 1; 1 Gr. §§ 212-235; St. arts. 21-24; Wharton on Crim. Ev. § 651. Greenleaf confines the word confession to direct statements of guilt. Statements tending to prove links in the chain of evidence of guilt are by him classed as admissions. Best and Stephen apply the word confession to every statement tending to prove crime. 1 Gr. §§ 170, 193; Best § 523; St. art. 21. The so-called admission by silence, or confession by silence, for example, silence under an accusation or denunciation, appears to come in not by virtue of any exception to the hearsay rule but simply by virtue of the fact that such silence, taken in connection with the words, is a fact logically relevant. 1 Gr. § 197.

⁴ The usual doctrine is that such evidence is admissible in either civil or criminal cases.

⁵ In some states the exception is extended to civil cases where the witness is out of the jurisdiction and a diligent attempt has been made to procure his attendance or deposition. 1 Gr. § 163, n. (a); *Slosser v. Burlington*, 47 Iowa, 300, 302.

witness at the former trial.¹ The precise words need not be proved. It is enough to prove the substance, provided it be the substance of the whole of the witness' testimony on direct examination and cross-examination and re-examination. Under this exception to the hearsay rule belong deposition taken pursuant to a bill to perpetuate testimony or pursuant to any statutory method taking the place of such a bill, as the theory in such cases is that the proceeding is in the nature of a suit and that all persons interested are made parties.²

§ 31. Sixth Exception to Hearsay Rule. Declarations in Course of Business.—Evidence of declarations made in the course of official or professional duty is admissible, provided (a) they were made almost contemporaneously with the facts stated, and provided (b) the declarant made them upon the basis of knowledge that he had or ought to have had, and provided (c) the declarant be now dead or insane or absent from the jurisdiction.³ The declaration may be either oral or written. If written the writing itself is admissible.⁴ The declaration, it will be observed, even if written, need not fulfil the requirements as to a book of accounts.⁵

§ 32. Seventh Exception to Hearsay Rule. Declarations against Interest.—Evidence is admissible of the declaration of a deceased person against his pecuniary or proprietary interest; and if the declaration is shown to have been against such interests, collateral matters contained in it and not against interest are also admissible. Evidence of a declaration against interest is admissible for or against any one, whether represented by the declarant or not. The declaration need not have been made before the arising of a controversy.⁶ The declaration may be either oral or written. If written, the writing, considered as proof of the truth of the statements contained therein, is equivalent to oral evidence of an oral statement made by the declarant.⁷

1 1 Gr. §§ 163-165; Best, § 496, n. 1; St. art. 32.

2 For example see Iowa Code, §§ 3745-3750.

3 1 Gr. §§ 115-116, 120; St. art. 27; Best, § 501, n. 1.

4 See §§ 52-55.

5 See § 27.

6 1 Gr. §§ 147-153; Best, § 500, n. 1; St. art. 28.

7 See §§ 18, 24.

§ 33 Eighth Exception to Hearsay Rule. Dying Declarations as to Cause of Death in Homicide Cases.—In a criminal trial for homicide, evidence is admissible of the declaration of the deceased as to the circumstances of the affray or other cause of death, provided the declaration be made under a sense of impending death.¹ If the declaration be written by the declarant or be signed by him, the writing is the primary evidence of that declaration; but this does not exclude oral evidence of other declarations.²

§ 34. Ninth Exception to Hearsay Rule. Declarations as to Pedigree.—Evidence is admissible of the oral or written statements of a person as to matters of pedigree pertaining to his family, provided (a) the person making the statements be now dead, and provided (b) the statements were as to his own knowledge or as to the tradition in the family, and provided (c) the statements were made before the arising of actual controversy regarding the matter.³ Pedigree includes, for the purposes of this exception, decent, relationship, birth, marriage, and death. Husband and wife are considered members of each other's family. Allied to this genuine exception to the hearsay rule is the practice admitting records in family Bibles, inscriptions on family plate or tombstones, and the like, even though such records or inscriptions were not made by a member of the family, provided the records or inscriptions be so placed that members of the family would see them;⁴ but this practice is really not an exception to the hearsay rule, since it simply admits the records or inscriptions and the action of the family as connected facts logically revelent to the question whether the records or inscriptions were truthful.⁵

§ 35. Tenth Exception to Hearsay Rule. Declarations as to Matters of Public or General Interest. General Reputation.—Evidence is admissible of statements as to a matter of public interest or of general interest, or as to a private boundary,⁶ provided (a)

¹ 1 Gr. §§ 156-159; Best, § 506, n. 1; St. art. 26.

² 1 Gr. § 161.

³ Best, § 498, n. 1; 1 Gr. §§ 108-104; St. art. 81; Abbott's Trial Ev. 90-96.

⁴ Best, § 498, n. 1; 1 Gr. § 105.

⁵ See §§ 18, 19, 20.

⁶ The point as to private boundaries is new, and not recognized in all states, Best § 497, n. 1.

the person making the statements be now dead,¹ and provided (b) the person making the statements had opportunity for knowledge, and provided (c) the statements be made before the arising of actual controversy regarding the matter.² The proviso as to opportunity for knowledge does not apply to statements as to a matter of public interest. As to all of the matters covered by this exception to the hearsay rule, evidence of general reputation is also admissible, such reputation being considered equivalent to statements of persons now deceased.³

§ 36. Eleventh Exception to Hearsay Rule. Declarations of Testator as to lost Will.—When a will is lost, evidence is admissible of the testator's declaration as to its contents.⁴

§ 37. Death as bearing on the Exceptions.—The following exceptions to the hearsay rule are wholly independent of death; contemporaneous exclamatory narrations, books of account, admissions, confessions. The following exceptions require as a condition of admissibility the death of the declarant: former testimony (insanity or absence will do), declarations in course of business (insanity or absence will do), declarations against interest, dying declarations, declarations as to pedigree, declarations as to matters of public or general interest, declarations of testator as to contents of lost will.

§ 38. Actual Dispute as bearing on the Exceptions.—Declarations as to pedigree and declarations as to matters of public or general interest must be made before actual dispute. There is no similar requirement as to the other exceptions.

§ 39. Same Evidence under several Exceptions.—It may happen that the same piece of evidence is admissible under either one of several exceptions. Thus, an admission may be also a declaration against interest and a declaration in course of business.

¹ *Quaere* whether insanity or absence from the jurisdiction will be accepted as equivalent to death. Best, § 497, n. 1.

² Best, § 497, n. 1; 1 Gr. § § 132-145, note; St. art. 30.

³ Best, § 497, n. 1. (b).

⁴ St. art. 29.

CHAPTER VI.

OPINION.

§ 40. Rule excluding Opinion.—The opinion of a witness is inadmissible, unless it comes within one of the following exceptions.¹

§ 41. First Exception. Easy Inferences from complicated Facts.—Evidence is admissible of the inference drawn from facts even by a person not an expert, provided the inference be one easy to draw and provided the facts upon which it is based be intricate or numerous or incapable of complete narration.² Such is the inference of a non-expert as to the sanity of a person with whom he is acquainted.

§ 42. Second Exception. Expert Testimony.—When the determination of a question requires peculiar habits or study, the opinion of an expert is admissible.³ This opinion must not be based upon the evidence in the case, but either must be based upon the expert's own knowledge of the facts, whether such knowledge be obtained by experiment or otherwise, or must be drawn out by an hypothetical question based upon the assumed facts.⁴

§ 43. Handwriting.—Perhaps the matter as to which opinion is most often asked is handwriting. When the question is whether a signature or other manuscript matter is in the handwriting of a certain person, any one who has seen that person write may give an opinion, and so may any one who has received from that person matter apparently in that person's handwriting.⁵ One who is not thus acquainted with the handwriting in question may, if he be an expert in handwriting, give an opinion based upon a comparison of the specimen in

¹ Best, § 511, n. 1; 1 Gr. § § 440-441; St. arts. 48-54; Wharton on Ev. § § 509-515.

² St. art. 48, note by May; Rogers on Exp. Test. § § 1, 3-4. It is questionable whether such an inference should be called an opinion. Best, § 511, n. 1, (a).

³ Rogers on Exp. Test. § § 6-8; Wharton on Ev. § § 434-456, 665.

⁴ Rogers on Exp. Test. § § 26-27; 1 Thompson on Trials, § § 587-635.

⁵ *Quære* whether such evidence belongs under the first or the second exception.

question and other specimens which are proved to the satisfaction of the court to be genuine.¹

CHAPTER VII.

REPUTATION.

§ 44. **Reputation Excluded.**—Evidence is inadmissible to show that any person possesses a certain reputation.²

§ 45. **First Exception. Witness' Reputation for Veracity.**—In all cases, evidence is admissible to show that a witness has a bad reputation for veracity; and such evidence having been given, evidence that he has a good reputation for veracity becomes admissible.³

§ 46. **Second Exception. Reputation of Accused.**—In a criminal case evidence is admissible that the accused has a good reputation; and, such evidence having been given, evidence is admissible to contradict it.⁴

§ 47. **Third Exception. Reputation of Assailant.**—In a criminal case, the defense being self-defense or the like, evidence is admissible that the reputation of the accused's assailant was such as to justify the accused in considering his own life in danger.⁵

§ 48. **Fourth Exception. Reputation in Issue.**—In civil cases, evidence of the reputation of a party seems to be admissible if character be in issue.⁶ Practically this means that in a suit for libel or slander the reputation of the plaintiff may be shown for the purpose of aiding the jury in assessing damages.

¹ As to comparison of handwriting there is a conflict in the authorities. In some jurisdictions the documents used as the basis of the comparison must be documents introduced for other purposes. Best, § § 232, n. 1; St. art. 52; 1 Gr. § § 576-581. See Iowa Code, § 3655.

² Almost invariably, the word "character" is used; but reputation is what is meant. 1 Gr. § 54; St. art. 55; Best § 256, n. 1.

³ Best, § 256, n. 1; Wharton on Ev. § § 47-56, 562-565, 569. In Iowa, the general moral character of a witness may be shown. Code, § 3648.

⁴ St. art. 56; Best, § 256, n. 1.

⁵ 2 Bishop on Crim. Proc. § § 609-616.

⁶ St. art. 57, Taylor on Ev. (8th ed.) § § 354-363; Best, § 256, n. 1; 1 Gr. § § 54-55, and notes; 2 Gr. § 275.

CHAPTER VIII.

ANOTHER TRANSACTION.

§ 49. **Rule Excluding Res inter alios acta.**—Evidence regarding another transaction, whether between the parties to the transaction under investigation or between other parties, is excluded.¹

§ 50. **First Exception. Intention.**—If the question is with what knowledge, good or bad faith, or intention, the party to the transaction under investigation acted, evidence may be given of another transaction that throws light on such knowledge or intention; but this evidence is admissible simply as showing the knowledge or intention, and not as showing that the transaction under investigation actually occurred.²

§ 51. **Second Exception. Inanimate Objects.**—When the question is as to the effect producible by machinery or other inanimate objects, it seems that evidence is admissible of transactions closely like the transaction under investigation.³

CHAPTER IX.

CONTENTS OF DOCUMENTS.

§ 52. **Rule excluding secondary Evidence.**—To prove the contents of a document, the original must be introduced, and not a letter-press copy, nor a photograph, nor any other sort of copy, nor parol evidence.⁴ If the document be one of a number almost necessarily alike, for example photographs from the same negative or copies of the same book, each of them is primary evidence of the contents of the others.

§ 53. **First Exception. Destroyed or lost Document.**—Secondary evidence is admissible if both of the two following facts be shown: (a) that the original is destroyed, or lost, or in the

¹ Best, § 506, n. 1; St. arts. 10-12; 1 Gr. §§ 52-53 and notes; Wharton on Ev. §§ 173-176; 14 Am. L. Rev. 350.

² 1 Thompson on Trials, §§ 330-332; St. art. 11.

³ Wharton on Ev. §§ 29, 33-34, 1295; 1 Gr. § 53 and notes; Best, § 506, n. 1; St. art. 10.

⁴ This is usually called the Best Evidence Rule. Best, § 87, n. 1; St. arts. 63-65, 70-71; 1 Gr. §§ 63-97. *Quære* whether an admission is excluded. 1 Gr. §§ 86, 96, 208; Best §§ 87, n. 1, 215 n. 1, 525-526. A document, considered as proof of its words, and not as proof of the facts recited in it, is real or immediate evidence. This is the only case in which real or immediate evidence is required.

possession of the adverse party or of a stranger; and (b) that proper search has been made for a lost document, or that notice has been given to the adverse party to produce a document in his possession, or that by *subpœna duces tecum* the attempt has been made to secure the presence of the person having the document.

§ 54. **Second Exception. Document immovable or public.**—Secondary evidence is admissible if the document be public property or immovable or in possession of a person out of the jurisdiction.¹

§ 55. **Grades of Secondary Evidence.**—Although it is often said that in the absence of primary evidence the best available secondary evidence must be given, it seem that, in the absence of statutes requiring secondary evidence of a special kind, there are no grades of secondary evidence. One may produce an inferior sort, for example, the testimony of a witness, who once read the document, even though one may have a letter-press copy at hand.²

CHAPTER X.

PAROL EVIDENCE EXCLUDED BY STATUTE.

§ 56. **Statute of Frauds.**—Parol evidence is not admissible of matters as to which the Statute of Frauds or any other statute requires written evidence.³ If it be proved that the requisite writings once existed, secondary evidence of its contents may be given in accordance with the rules heretofore explained.⁴

CHAPTER XI.

VARYING SOLEMN DOCUMENTS.

§ 57. **Parol Evidence Rule.**—Evidence is not admissible in order to contradict or vary a solemn document as between the

¹ St. art. 71. There are usually statutes providing that copies of public records are admissible. For example, see Iowa Code, §§ 3654-3656, 3659-3660, 3712-3720; U. S. R. S. §§ 905-906.

² *Sed quidam.* Best, §§ 87, n. 1, 215, n. 1; 1 Gr. § 84, notes; Wharton on Ev. § 90.

³ 1 Gr. §§ 261-274; Best, § 596, n. 1. See Iowa Code, §§ 1934, 2261-2262, 2264-2266, 2629, 3363-3667.

⁴ See §§ 58-59.

parties or their representatives.¹ The evidence with which it is usually attempted to vary a document is parol evidence, and hence this rule is called the Parol Evidence Rule.

§ 58. **Solemn Documents.**—The rule applies to only solemn documents, e. g., wills, conveyances, or other instruments clearly intended to include a full account of the transaction. Hence the rule does not apply to receipts, bills of lading, and other memoranda.

§ 59. **Subsequent Agreements.**—Nor does the rule exclude evidence of subsequent agreement superseding or amending the original.

§ 60. **Independent collateral Agreements.**—Nor does the rule exclude evidence of collateral agreements not intended to be included in or superseded by the solemn document. Clearly, however, it is difficult to show that a contemporaneous agreement as to the same subject matter was not intended to be embodied in or superseded by the document.²

§ 61. **Construction.**—Nor does the rule exclude evidence that simply attempts to interpret the document.³ The chief rules of construction are: (1) The meaning of technical words may be shown, and it may be shown that common words have in a trade or community an uncommon meaning; (2) The circumstances surrounding the parties may be shown in order to cast light upon the meaning; (3) When language applies with substantial accuracy to one, and only one, person or thing, no evidence of circumstances or of statements of intention is admissible to show that another person or thing was meant; (4) When language applies with substantial accuracy to either of two or more persons or things, evidence of circumstances and also of statements of intention is admissible; (5) When lan-

¹ 1 Gr. §§ 275-305; Best § 226, n. 1; St. arts. 90-92, and Appendix, notes XXXII. and XXXIII.

² 1 Harv. Law Rev. 299.

³ The old distinction between interpretation and construction is of no practical value. The same is true of the old distinction between patent and latent ambiguities. Jones on Construction §§ 2, 46-52.

guage does not apply with substantial accuracy to any person or thing, but applies inaccurately to several, evidence of circumstances is admissible, but not of statements of intention.¹

§ 62 **Void.**—The rule does not exclude evidence showing that the document is void or voidable because of fraud, duress, illegality, incapacity of parties, lack of delivery, or other reason.

§ 63. **Reformation.**—Nor does the rule exclude evidence, in a suit properly brought, to show that the document should be reformed.

§ 64. **Condition precedent.**—Nor does the rule exclude evidence showing that there was a condition precedent.

§ 65. **Incident annexed by Custom.**—Nor does the rule exclude evidence showing that there was an incident annexed by custom, provided the custom do not contradict the words of the document.

§ 66. **Recitals.**—Nor does the rule protect the recitals, e. g., statements as to consideration, date, place.

§ 67. **Third Persons.**—Finally, it must be borne in mind that by putting a transaction into writing the parties do not subject any third person, for example, the state, to the exclusionary rule under consideration.

CHAPTER XII.

PRIVILEGED MATTERS.

§ 68. **Reason of Privilege.**—For various reasons connected with public policy some communications and some witnesses are privileged. The instances of privilege are collected in this chapter; and in each instance the reason for the privilege is obvious.²

§ 69. **Counsel and Client.**—Professional communications between counsel and client are privileged, unless the client

¹ The rules of construction given above are the ones that are most intimately connected with the law of evidence. Apparently most rules of construction, perhaps all, belong with the substantive law as to contracts, conveyances, wills, etc. Best, § 226, n. 1, B, (e).

² Best, § 578, n. 1; 1 Gr. § § 286-284; St. arts. 110-120.

waives the privilege. The statutes of many states extend the same privilege to confidential communications made to physicians and minister in their professional capacity.¹

§ 70. **Husband and Wife.**—Similarly communications between husband and wife are privileged.²

§ 71. **State Secrets.**—No one can be compelled to testify to state secrets nor to any matters for which the public interest may demand privacy, for example, in general, the events that happen in grand or petit jury rooms.³

§ 72. **Privilege of a Witness.**—A witness cannot be compelled to answer a question when to do so would tend to subject him to punishment for crime. Unless otherwise provided by statute, this privilege does not extend to matters tending merely to cause disgrace or loss of property.⁴

CHAPTER XIII.

INCOMPETENT WITNESSES.

§ 73. **Evidence excluded because of Incompetency of Witness.**—Evidence is inadmissible if the witnesses who are offered are because of youth or other disability not competent to testify.⁵

§ 74. **Mental Incapacity.**—A witness is incompetent to testify if, because of youth or of other mental deficiency, he does not understand the nature and obligation of an oath.

§ 75. **Religious Incapacity.**—In most states there is no longer a requirement that a witness must believe in the existence of God and in a future state of rewards and punishments.⁶

§ 76. **Infamous Crime.**—The old rule rendering a person convicted of an infamous crime incapable of testifying has disappeared; but the conviction can be shown for the purpose of diminishing the weight of the evidence.

¹ For example, see Iowa Code, § 3643.

² Compare Iowa Code, § 3642.

³ Compare Iowa Code, § 3644.

⁴ 1 Gr. §§ 451-457; Best, 578, n. 1. In Iowa, matters tending to expose a witness to public ignominy are privileged, with the exception of a previous conviction of felony. Apparently matters tending to cause a forfeiture of estate are not privileged, Iowa Code, §§ 3545-3548. See also 1 Thompson on Trials, §§ 286-298.

⁵ Best, § 134 n. 1; St. arts. 105-109; 1 Gr. §§ 336-338.

⁶ In Iowa a lack of religious belief may be shown in order to affect the weight of the evidence given. Iowa Code §§ 3636-3637; Iowa Constitution, art. 1, sec. 4.

§ 77. **Husband and Wife.**—A husband is not competent to testify against his wife, nor a wife against her husband. The limits of this rule are largely statutory, however.¹

§ 78. **Interested Parties.**—The old rule excluding the testimony of parties has disappeared. There remains, however, in many states and in the United States courts, a statutory provision to the effect that a party to a suit, or his wife, cannot testify to a transaction between himself and a deceased or insane person whose representative is the other party to the suit.²

CHAPTER XIV.

MATTERS TOO REMOTE.

§ 79. **Too Remote.**—Matter that appears to the judge to be too remote may be excluded even though it be logically relevant.³ It is seldom, however, that evidence is excluded solely upon the ground of remoteness. Usually there is some other ground, for example, that the evidence is logically irrelevant, or that it is directed to a point already sufficiently proved.

PART III.

MODE OF INTRODUCING EVIDENCE.

CHAPTER XV.

EXAMINING WITNESSES,

§ 80. **Oral Testimony and Depositions.**—The testimony of a witness may be given orally in open court or, proper formalities being observed and proper facts as to the impossibility of producing the witness being shown, may be given in a deposition. The main points as to depositions are that they are taken on notice to the opposite party and that they are admissible only when the witness is dead, insane, or absent from the jurisdiction, but in states following the old chancery practice depositions are admissible in all equity cases. When depo-

¹ "Except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other," Iowa Code, § 3641, as amended by 15 G. A. Ch. 32.

² For the Iowa provision see Iowa Code, §§ 3637-3639. See also U. S. R. S. § 852.

³ St. art. 2-3.

sitions are taken, the examination consists, as in open court, of direct examination, cross-examination, and re-examination. The exact points as to depositions must be sought in statutes.¹

§ 81. **Direct Examination.**—In the direct examination leading questions may not be asked, except (1) to bring out merely preliminary matters, for example, name and residence, and (2) to bring to the witness' knowledge the admitted facts upon which his testimony is to be based, and (3) when the witness is hostile, and (4) when, in the discretion of the court, time will be saved or justice served.²

§ 82. **Cross-Examination.**—In cross-examination, leading questions may be asked. In most of the states, cross-examination must be confined to matter touched upon in the direct examination, or to collateral matters tending to show the witness' bias, accuracy, truthfulness, or means of knowledge.³ As to collateral matters, the witness cannot be contradicted, except that: (1) If a witness says he has never been convicted of felony, he may be contradicted by producing the record;⁴ (2) If a witness says he is unbiased, the contrary may be proved;⁵ (3) If a witness denies having made a statement inconsistent with his present testimony, such statement may be proved,⁶ provided the witness' attention was carefully called to such prior statement. The scope of cross-examination is largely within the discretion of the judge; and the judge will not allow cross-examination to degenerate into mere abuse.

§ 83. **Re-Examination.**—In re-examination leading questions must not be asked. Re-examination must be restricted to matters touched upon in cross-examination. It is true that the

¹ For example, see U. S. R. S. § § 861-870; Iowa Code, § § 8721-8764, 4571-4572; Iowa Const. art. 1, sec. 10.

² 1 Gr. § § 434, 435; Best, § § 641, n. 1; 644, n. 1; St. art. 128; Wharton on Ev. § § 499-506; 1 Thompson on Trials, § § 357-360.

³ Best, § 644, n. 1; Wharton on Ev. § 550; 1 Gr. § § 447-449; St. arts. 126-133; 1 Thompson on Trials, § § 405-475.

⁴ St. art. 130. See also Iowa Code, § 3648. *Quære* to what extent witness may be contradicted as to other matters that used to render the witness incompetent but now simply lessen his weight. Iowa Code, § 3637.

⁵ 1 Gr. § § 450, 455, and notes; St. art. 130; Wharton on Ev. § 561.

⁶ St. art. 131; Wharton on Ev. § 555; Best, § 644, n. 1; 1 Thompson on Trials, § § 490-506, 571-581.

judge may in his discretion allow re-examination to go into other matters; but then the other party can cross-examine as to such matters.¹

§ 84. A disappointing Witness.—In most of the states it is not allowable to attack one's witness by showing that he has been guilty of felony, or that he is biased, or that he has a bad reputation. Yet the restriction against attacking one's own witness does not prevent an attack upon a necessary witness, *e. g.*, a witness to a document. Nor does the restriction prevent over-balancing the testimony of one's witness by the testimony of other witnesses. Nor does it prevent, in case of surprise, the question whether the witness has previously made an inconsistent statement; but the answer to this question cannot be contradicted.²

§ 85. Refreshing Memory.—A witness may refresh his memory by referring to a memorandum made by any one at or reasonably near the time of the events therein narrated, provided the witness on reading the memorandum shall recollect the facts or at least remember that he once knew the memorandum to be accurate.³ The memorandum itself does not become evidence.

§ 86. Witness' Right to correct his Testimony.—When a witness is on the stand he has the right, of his own motion, to correct any testimony that he has given erroneously, because of forgetfulness, inadvertence, or misunderstanding; and in the discretion of the court a witness may be recalled for this purpose.⁴

CHAPTER XVI.

INTRODUCING DOCUMENTS IN EVIDENCE.

§ 87. Private Documents.—A document may be put in evidence upon proving its execution. If it be attested, the execution must be proved by one of the attesting witnesses, unless no such witness is alive, sane, and within the jurisdic-

¹ 1 Thompson on Trials, § § 480-486.

² Best, § § 645, 644, n. 1; 1 Gr. § § 442-444; Wharton on Ev. § § 549-550.

³ Best, § 224, n. 1; 1 Gr. § § 437-438; St. arts, 136-137; 1 Thompson on Trials, § § 398-402.

⁴ 1 Thompson on Trials, § § 350, 475.

tion of the court, or unless the document is produced by an adverse party claiming an interest under it. If not attested, it may be proved by evidence as to handwriting or otherwise. If more than thirty years old, it proves itself, if produced from proper custody, whether attested or not.¹

§ 88. **Public Documents.**—When it is necessary to put public documents in evidence, the general rule is that there must be a copy certified under the seal of the proper official.² This, however, is a matter that is everywhere regulated by statute.³

CHAPTER XVII.

THE JUDGE'S DUTY AS TO ADMITTING EVIDENCE.

§ 89. **Admissibility.**—The admissibility of evidence is a question for the judge.⁴ He may admit evidence for which the proper foundation has not yet been laid. This is done upon the assurance of counsel that later the evidence will be shown to be admissible. If the evidence thus prematurely admitted is not eventually shown to be admissible, it should be withdrawn from the jury by an instruction; but apparently such an instruction does not always cure the error.⁵

§ 90. **Form of Questions.**—The judge decides whether questions are leading and whether the circumstances allow leading questions to be put.⁶

§ 91. **In General.**—Finally, the judge has a wide discretion as to the order of the evidence, as to reopening the case for further evidence, and as to the number of witnesses on any one point.⁷

Eugene Wambaugh.

¹ Best, §§ 215, n. 1, 499, n. 1; St. arts. 65-68, 88; 1 Gr. § § 141-142, 569-575.

² Best, § 485, n. 1; St. arts. 73-84.

³ St. art. 71; See R. S. U. S. § § 905-906; Iowa Code, § § 3654-3656, 3659-3660, 3712-3720.

⁴ 1 Gr. § 46; 1 Thompson on Trials, § § 318-328.

⁵ 1 Gr. § 51 a; 1 Thompson on Trials, § 351.

⁶ 1 Thompson on Trials, § § 387, 384, 387-390.

⁷ 1 Thompson on Trials, § § 343-356.

APPENDIX A.

TOPICS OFTEN TREATED AS PARTS OF THE LAW OF EVIDENCE

The standard works of the law of Evidence include many matters that strictly belong to the law of Procedure or to other branches. This synopsis, however, does not attempt to go beyond the limits of the law of Evidence as defined in § 1. For full discussions of the most important matters thus excluded, see the following references:

(a) Presumptions. 3 Harv. L. Rev. 141; Best, § § 43, n. 1, 265, n. 1, 296, n. 1, 304, n. 1, 433, n. 2; St. arts. 98-101; Wharton on Ev. § § 1226-1365; Wharton on Crim. Ev. § § 707-851; 1 Bishop on Crim. Proc. § § 1096-1131.

(b) Burden of proof. 4 Harv. L. Rev. 45; Best, § 265, n. 1; 1 Gr. § 74 and notes; Wharton on Ev. § § 353-371; Wharton on Crim. Ev. § § 319-344; 2 Thompson on Trials, § 1831.

(c) Right to begin. Abbott's Civil Brief, 30-34; 1 Thompson on Trials, § § 225-259; Best, § § 265, n. 1, 637.

(d) Estoppels. Best, § 532, n. 1; St. arts. 102-105; Bishop on Contracts, § § 264-311.

(e) Conclusiveness of judgments. Best, § 588, n. 1.

(f) Law and fact and the respective provinces of judge and jury. 4 Harv. L. Rev. 147; Best, § § 11, n. 1, 82, n. 2; 1 Gr. § 49 and notes; 1 Thompson on Trials, § § 940-944, 1051-1109, 2132-2219, 2280-2333; 1 Bishop on Crim. Proc. § § 982 b-989 b.

(g) Taking the case from the jury. 1 Gr. § 49 and notes; 2 Thompson on Trials, § § 2225-2273.

(h) Number of witnesses requisite in certain cases. Best, § 596, n. 1; Wharton on Crim. Ev. § § 386-389.

(i) Reasonable doubt. 2 Thompson on Trials, § § 2461-2519; 1 Bishop on Crim. Proc. § § 1091-1095; 1 Gr. § 13 a and notes.

(j) Exemption of ambassador or president from *subpoena*. Best, § 125, n. 1.

(k) Methods of compelling production of documents. Best, § 624, n. 1; 1 Thompson on Trials, § § 730-810.

(l) Agents and partners. 1 Gr. § § 111-114; Best, § 519, n. 1.

(m) Conspirators. 1 Gr. § § 111, 407; Best, § § 508, 551, n. 1; St. art. 4; 1 Thompson on Trials, § 393; 2 Bishop on Crim. Proc. § § 228-232.

(n) It has seemed unnecessary to discuss the distinction between direct and circumstantial evidence. Best, § 293, n. 1; 1 Gr. § 13 and note; Wharton on Crim. Ev. § § 10-20.

states have since been divided into two or more districts, but no district, embraces more than one state.¹ In each of these districts, (with some exceptions where one judge is appointed for two or more districts in the same state) is appointed for life by the President of the United States, with the approval of the Senate, a district judge, who must be a resident of the district² and who holds a district court at one or more places in the district.³ The salary of the district judges is \$5,000 per year.⁴

Jurisdiction.—The principal classes of cases in which jurisdiction is vested in the district court are the following: prosecutions for crimes not capital; suits for penalties and forfeitures under laws of United States; suits at common law by the United States; suits in equity to enforce the lien of an internal revenue tax, or subject property to the payment of such tax; causes of action arising under the postal laws; civil causes under admiralty and maritime jurisdiction, and prize cases; suits by an alien for a tort in violation of the law of nations, or of a treaty of the United States; suits against consuls, or vice-consuls, except for capital offenses.⁵ Other classes of cases relating to deprivation of civil or political rights are not of such general importance as to warrant description here. The court has no appellate jurisdiction, and it cannot acquire jurisdiction by removal of cases to it from state courts. Jurisdiction of the district court in cases against the United States will be referred to in connection with the court of claims.

CIRCUIT COURTS.

Organisation.—By the original judiciary act of 1789 the judicial districts of the United States were grouped into three circuits, for each of which a circuit court was established, consisting of two justices of the Supreme Court and a judge of the district court. At present there are nine circuits. To each circuit a justice of the Supreme Court is assigned, and for each there are appointed for life, by the President, with

¹ U. S. Rev. Stat., Sec's 530-550.

² U. S. Rev. Stat., Sec's 551-562.

³ U. S. Rev. Stat., Sec's 572-603.

⁴ Act of Feb. 24, 1891, 26 U. S. Stat. at Large, 733.

⁵ U. S. Rev. Stat., Sec. 563.

the approval of the Senate, two circuit judges, with a salary of six thousand dollars.¹ A circuit court is held (with unimportant exceptions) in each district, sometimes at more than one place in each district, by the justice of the Supreme Court assigned to the circuit in which the district is included, or by a circuit judge of that circuit, or by the district judge of that district, or by any two of the judges who are thus authorized to hold the circuit court.²

Jurisdiction.—The jurisdiction of the circuit court extends to all offenses against the laws of the United States (being concurrent therefore with the district court as to all such offenses as are not capital, and exclusive as to those which are capital), and to civil cases, without regard to the amount in controversy, as follows: suits at law or in equity arising under the patent or copyright laws; suits at law or in equity under the revenue laws, except suits for penalties and forfeitures; causes arising under the postal laws; suits at common law, where the United States, or any officer thereof suing under authority of any act of Congress are plaintiffs; suits of various kinds for damages or penalties for violation of statutes relating to civil rights and the election franchise,³ also summary proceedings under the interstate commerce law;⁴ proceedings under the act to protect trade and commerce against unlawful combinations, trusts, conspiracies, etc., either by way of injunction, or the recovery of damages;⁵ and cases under the immigration acts.⁶ As to suits against the United States the circuit court has some jurisdiction concurrently with the court of claims, as will be explained in connection with that court. The principal part of the jurisdiction of the circuit court is however, that given and regulated by the act of 1888⁷ which superseded previous statutes on the subject. Under this act

¹ U. S. Rev. Stat., Sec's 605-608; Act of Mar. 3, 1891, Sec. 1, 26 Stat. at Large, 533.

² U. S. Rev. Stat., Sec's 609-618.

³ U. S. Rev. Stat., Sec. 629.

⁴ Act of Mar. 2, 1889, Sec. 5, 25 Stat. at Large, 856.

⁵ Act of July 2, 1890, Sec. 4, 26 Stat. at Large, 209, Sec. 4.

⁶ Act of Nov. 3, 1891, Sec. 18, 26 Stat. at Large, 1084.

⁷ 25 Stat. at Large, 433. This act purports to be merely a correction of the act of 1887, (24 Stat. at Large, 552), but it contains additional provisions.

(as well as under the original judiciary act of 1789 and other statutes which it superseded) the original jurisdiction of the circuit court may be invoked either by bringing cases originally in that court, or by removing to that court for trial cases already commenced in the state courts. The cases which, under this statute, may be originally brought in the circuit court are: suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, under their authority, or in which the United States are plaintiffs,¹ or in which there is a controversy between citizens of different states, or between citizens of the same state claiming lands under grants from different states, or between citizens of a state and foreign states, citizens or subjects.² By the provisions for removal, a case which might originally have been brought in the circuit court, if brought in a state court may be removed for trial into the circuit court on application of defendant, if the case be one arising under the constitution, laws, or treaties of the United States, or in any other case by the defendant or defendants therein being non-residents of the state.³ If in a suit in a state court, wherein the amount in controversy exceeds two thousand dollars,⁴ there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, citizen of another state, upon a showing in the circuit court that by reason of prejudice or local influence he will not be able to obtain justice in such state court, may, before trial in the state court, have the case removed to the circuit court.⁵

The circuit court formerly had jurisdiction of appeals in some cases from the district court, but all appellate jurisdiction

¹ The language of the act leaves it doubtful whether the amount in controversy must be \$2,000 in cases in which the United States are petitioners. Under the act of 1875 (18 Stat. at Large, 470) there was the same requirement as to the amount in controversy in these cases as in others.

² Act of Aug. 18, 1888, Sec. 1, 25 Stat. at Large, 438.

³ *Ibid.*, Sec. 2, 25 Stat. at Large, 438.

⁴ *Ex parte Pennsylvania Co.* 137 U. S. 451.

⁵ Act of Aug. 18, 1888, Sec. 2, 25 Stat. at Large, 438.

has now been taken away,¹ except, it seems, some power to review decisions of revenue boards of appraisers.²

CIRCUIT COURTS OF APPEALS.

Organization.—A new court has recently been created by act of March 3, 1891,³ to be a court with appellate jurisdiction, held at one or more places in each circuit by any three of the judges who are qualified to hold circuit court in any district in said circuit, district judges being assigned to such duty if necessary.

Jurisdiction.—The purpose of the organization of this court seems to have been to relieve the Supreme Court in the exercise of its appellate jurisdiction, and to provide more effectually for the review of the decisions of the circuit and district courts. Therefore it is provided that appeals in some classes of cases formerly going to the Supreme Court shall now be taken to this court, and that an appeal may be taken to this court in all cases decided by the circuit and district courts in which appeals to the Supreme Court are not permitted, the former provisions for appeal from district to circuit courts being repealed. In cases where the federal jurisdiction depends upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, also in cases under the patent or revenue laws, also in criminal cases (where the crime is not capital or otherwise infamous in which case the appeal is to the Supreme Court), and in admiralty cases, the decision of the circuit court of appeals is final, that is, no further appeal is allowed, while in other cases a further appeal to the Supreme Court is provided for, as will appear in stating the appellate jurisdiction of the Supreme Court. No appeals are provided for in any case from a state court to the circuit court of appeals, but appeals may be taken to that court from territorial courts in those classes of cases over which the circuit

¹ Act of Mch. 3, 1891, Sec 4, 26 Stat. at Large, 826.

² Act of June 10, 1890, Sec. 15, 26 Stat. at Large, 181.

³ 26 Stat. at Large, 826.

court of appeals is given final appellate jurisdiction with reference to circuit and district courts. Appeals may be taken to the circuit court of appeals from the United States court in the Indian Territory in the same manner as from the circuit or district courts.¹

SUPREME COURT.

Organisation.—As originally constituted the Supreme Court consisted of a chief justice and five associate justices,² appointed for life by the president, with the approval of the Senate. The number of associate justices has been increased at various times, eight being the present number, and the salary of each is ten thousand dollars, that of the chief justice being ten thousand five hundred dollars.³ The court holds one term annually, at the national capital, commencing on the second Monday in October.⁴

Original Jurisdiction.—By the Constitution⁵ the Supreme Court has original jurisdiction “in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party.” This original jurisdiction cannot be extended by statute,⁶ but by statute this jurisdiction is made exclusive in some cases, to-wit, cases against ambassadors, or other public ministers, or their domestics, and also in cases to which a state is a party except between a state and its citizens or between a state and citizens of other states or aliens.⁷

Appellate Jurisdiction.—In all other cases within the jurisdiction of the federal judiciary the Supreme Court has appellate jurisdiction, to be exercised, however, under such regulations and limitations as by statute provided. The act establishing circuit courts of appeals has materially modified the law on this subject. Under provisions now in force the Supreme Court has appellate jurisdiction in the following classes of cases: (a) From district or circuit courts, (or from the United States

¹ The whole jurisdiction of the circuit courts of appeals is regulated by the act of March 3, 1891, 26 Stat. at Large, 836.

² Act of 1789, 1 Stat. at Large, 73.

³ U. S. Rev. Stat., Sec. 654.

⁴ *Marbury v. Madison*, 1 Cranch, 137.

⁵ U. S. Rev. Stat., Sec's 673-676.

⁶ Art. III, Sec. 2, Par. 2.

⁷ U. S. Rev. Stat., Sec. 657.

court in the Indian Territory,)¹ in any case where the jurisdiction of the lower court is in issue; from final sentences and decrees in prize causes; in case of conviction of a capital or otherwise infamous crime; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States;² (b) From a circuit court of appeals upon any question of law certified by that court to the Supreme Court,³ or in cases required by the Supreme Court to be certified to it⁴ from such circuit court of appeals, or in all cases in which the decision of such circuit court of appeals is not made final (as already explained in describing that court) and in which the matter in controversy exceeds one thousand dollars besides costs.⁵ (c) From a state court of last resort in a case involving a federal question and where the decision of the state court is against the validity of a statute or treaty of, or authority exercised under, the United States, or in favor of the validity of a statute of, or an authority exercised under, any state, where the validity of such statute or authority is called in question as being repugnant to the constitution, laws, or treaties of the United States, or where the decision is against any title, right, privilege, or immunity claimed under the constitution, statutes, treaties, or authority of the United States.⁶ (d) From the Supreme Court of any territory or of the District of Columbia, in cases where the matter in dispute, exclusive of costs, exceeds the value of five thousand dollars (but the limitation as to amount in controversy does not apply to cases involving the validity of any patent or copyright, or in which is drawn in question

¹ Act of May 2, 1890, Sec. 48, 26 Stat. at Large, 81; Act of March 3, 1891, Sec. 13, 26 Stat. at Large, 826.

² Act of March 3, 1891, Sec. 5, 26 Stat. at Large, 826.

³ Act of March 3, 1891, Sec. 6, 26 Stat. at Large, 826.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ U. S. Rev. Stat., Sec. 709.

the validity of a treaty or statute of, or authority exercised under, the United States.)¹ (e) From the Court of Claims, (or from district or circuit courts in cases against the United States), without limit as to amount if the appeal is by the United States, or, if the appeal is by the plaintiff, where the amount in controversy exceeds three thousand dollars, or the claim is declared forfeited for fraud.² (f) From decisions of the Court of Private Land Claims.³ (g) From decisions of a circuit court reviewing decisions of boards of appraisers, under an act relating to collection of the revenue.⁴ (h) From circuit courts in summary proceedings before them under the interstate commerce law, where the subject in dispute is of the value of two thousand dollars or more.⁵ A few other provisions for such appeals are found, which are not of sufficient general importance to be noted here.

OTHER COURTS.

Court of Claims.—The principle that a sovereign power cannot be sued in its own courts without its consent prevents the federal courts from having jurisdiction of suits against the United States, except as specially authorized, but in a suit by the United States defendant may have the benefit of credits and set-offs, under proper regulations.⁶ Provision was made, however, in 1855,⁷ for a court to investigate claims against the United States, and this court has been enlarged from time to time, and its jurisdiction extended, until now it is an important part of the federal judicial system. It consists of one chief justice and four associate judges, appointed like other federal judges, and receiving a salary of four thousand five hundred dollars per year, and its sessions are held at Washington.⁸ Its

¹ U. S. Rev. Stat., Sec's 702, 705; Act of Mar. 3, 1885, 23 Stat. at Large, 442. The Act of Mar. 3, 1891, gives to circuit courts of appeals (as already stated) jurisdiction of appeals from supreme courts of the territories in cases in which, if appealed from a circuit or district court, the decision of the circuit court of appeals would be final. To this extent the appellate jurisdiction of the Supreme Court as to territorial courts is doubtless taken away by that act.

² U. S. Rev. Stat., Sec. 707; Act of Mar. 3, 1887, Sec's 4 and 9, 24 Stat. at Large, 505; *United States v. Davis*, 131 U. S., 36.

³ Act of Mar. 3, 1891, Sec. 9, 26 Stat. at Large, 854.

⁴ Act of June 10, 1890, Sec. 15, 26 Stat. at Large, 181.

⁵ Act of Mar. 2, 1889, Sec. 5, 25 Stat. at Large, 855.

⁶ U. S. Rev. Stat., Sec's 951, 952. *United States v. Bank of Metropolis*, 15 Pet. 377.

⁷ 10 Stat. at Large, 612.

⁸ U. S. Rev. Stat., Sec. 1042.

present jurisdiction is, in general, as prescribed by the Act of March 3, 1887, and extends to any claims founded upon the Constitution, or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.¹ Either house of Congress, or (with the consent of claimant) the head of any executive department, may also refer any claim pending before Congress or such department, to the Court of Claims for the adjudication of any controverted fact.² The court is also given jurisdiction with reference to certain claim for indemnity for Indian depredations³ and other classes of claims which have from time to time been specially referred to it.

The Act of March 3, 1887,⁴ introduced a wholly new policy with reference to claims against the United States by providing that district courts shall have concurrent jurisdiction with the Court of Claims with reference to cases within the general jurisdiction of the latter court as provided for by that act, where the amount of the claim does not exceed one thousand dollars, and that the circuit courts shall have a like concurrent jurisdiction where the claim exceeds one thousand dollars, and does not exceed ten thousand dollars, trial in such cases being without a jury.

Judgments against the United States in the Court of Claims, or in district or circuit courts exercising the same jurisdiction, are not enforceable directly, but are only payable out of funds appropriated by Congress for that purpose.⁵

¹ 24 Stat at Large, 505.

² Act of March 3, 1883, 22 Stat. at Large, 485; Act of March 3, 1887, Sec's 12-14, 24 Stat. at Large, 505.

³ Act of March 3, 1891, 26 Stat. at Large, 651.

⁴ 24 Stat at Large, 505.

⁵ U. S. Rev. Stat., Sec's 1065, 1089; Act. of March 3, 1887, Sec. 11, 24 Stat. at Large, 505.

Court of Private Land Claims.—For the purpose of determining the validity of titles to lands in territory acquired by treaty with Mexico, claimed under Mexican and Spanish grants prior to such cession, a special court has been organized,¹ but as the subject matter of the court's jurisdiction is limited, and it is to go out of existence at the end of the year 1895, further description of it is not necessary.

Courts of District of Columbia and of Territories.—Under the authority of congress to legislate with reference to the District of Columbia and the territories, certain courts have been established, but as they do not exist under the judicial power granted in the Constitution they need not be further considered.

Consular Courts.—Under authority derived by certain treaties with Turkey, China, Japan, and some other non-christian nations, jurisdiction is given to consuls of the United States in those countries to try citizens of the United States for offenses against law committed there and also to determine civil suits to which citizens of the United States are parties.² These courts not being held within the territory of the United States, and having jurisdiction only as to citizens abroad, the provisions of the Constitution as to indictment for crime, jury trial, etc., are not applicable to them.³

COMMISSIONERS AND MAGISTRATES.

Each circuit court may appoint, in different parts of the district in which it is held, so many discreet persons as it may deem necessary, who shall be called "Commissioners of the Circuit Courts," (often termed United States Commissioners) and shall exercise various powers conferred upon them by statute.⁴ These commissioners may take affidavits in civil cases in the district or circuit courts,⁵ may bind over to keep the peace,⁶ may cause the arrest, on warrant, of persons

¹ Act of March 3, 1891, 26 Stat. at Large, 864.

² *Ross v. McIntyre*, 11 S. C. Rep. 897.

³ U. S. Rev. Stat., Sec. 945.

⁴ U. S. Rev. Stat., Sec's 4083-4180.

⁵ U. S. Rev. Stat., Sec. 627.

⁶ U. S. Rev. Stat., Sec. 777.

charged with crime under the laws of the United States, and take bail in such cases.¹ They are given powers in admiralty, under the civil rights acts, and with reference to supervision of federal election, which need not be particularly described.

The justices and judges of the United States, and the judges, justices of the peace and other magistrates of a state, as well as the commissioners just described, are authorized to cause the arrest of offenders against the laws of the United States, and to admit them to bail,² but it has been doubted whether federal authority can be thus conferred upon officers of a state.

Emlin McClain.

¹ U. S. Rev. Stat., Sec's 1014, 1015.

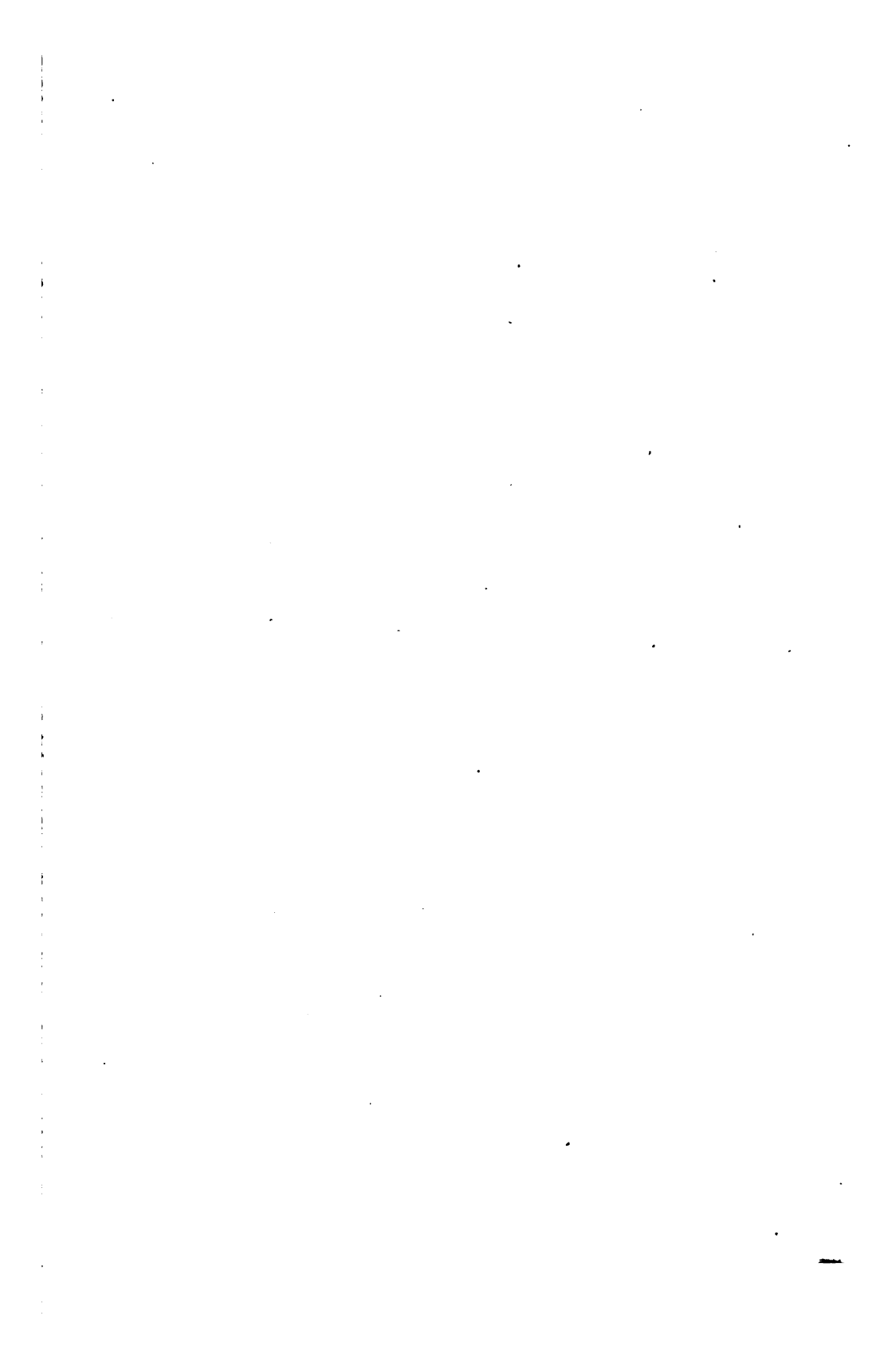
² U. S. Rev. Stat., Sec. 1014.

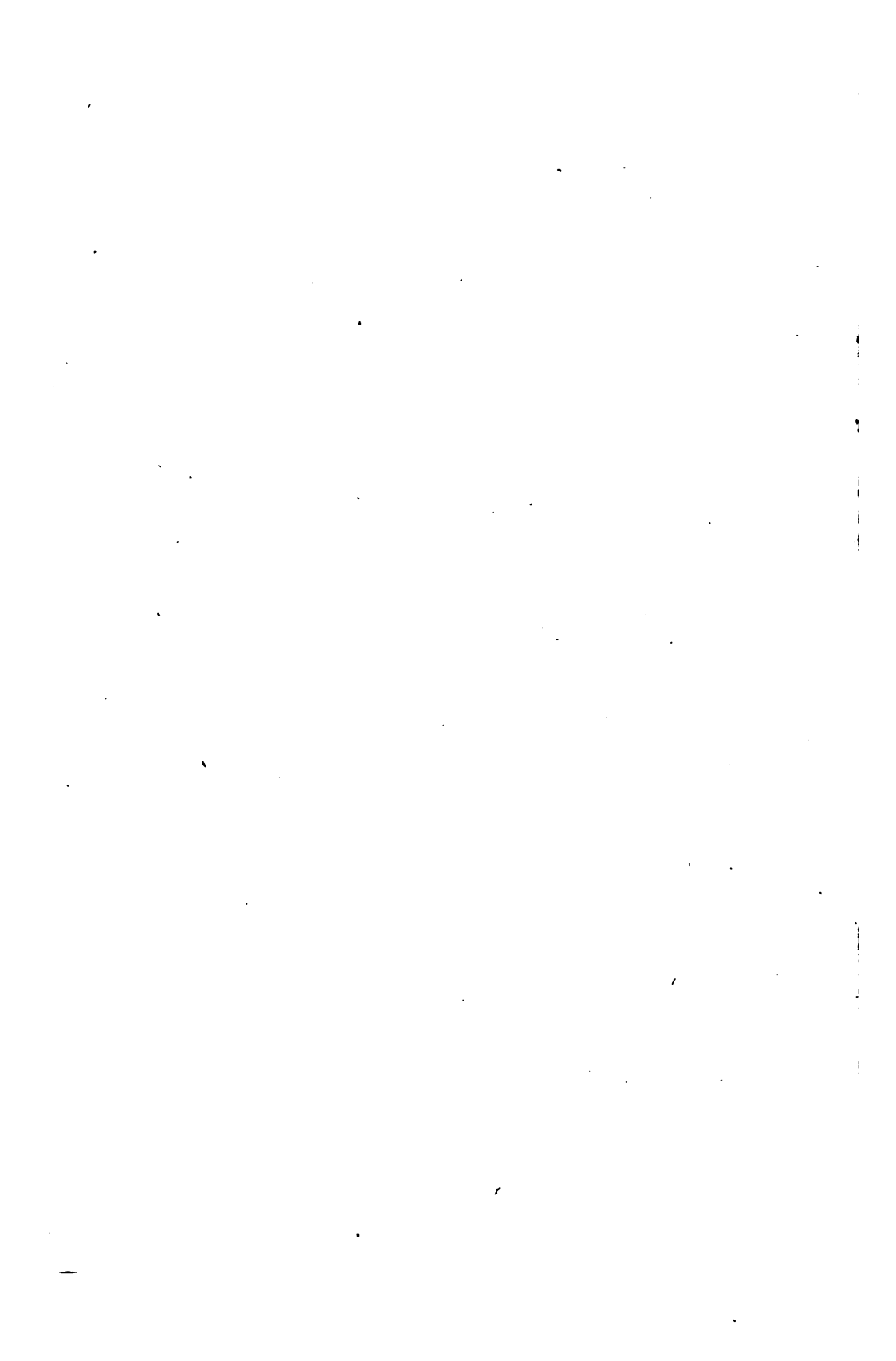
MISCELLANY.

Recent Books.

THE FEDERAL POWER OVER COMMERCE, and its Effect on State Action, by WILLIAM DRAPER LEWIS, Ph. D., Member of the Philadelphia Bar. Philadelphia: University of Pennsylvania Press, 1891. 8vo. Pp. xvi and 145.

This monograph gives a concise statement of the principles announced by the Supreme Court of the United States with reference to the effect of the commerce clause of the federal constitution as a restraint upon state action, and presents, in a short schedule at its conclusion, the point decided in each case of that character.





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MUNICIPAL LAW—AN ANALYSIS.

Law in its most general and comprehensive sense is defined by Blackstone as a rule of action.

This rule of action is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. In its more confined sense, it signifies the rules of human action or conduct.

In nature we call this rule the will of the Creator, and when we speak of the laws of Revelation, we mean such as Divine Providence has from time to time discovered in his Holy Scriptures.

In the Physical Sciences the word "Law" denotes the order of sequences or succession of phenomena.

And when we speak of those rules which regulate intercourse between sovereign States we assign the name International Law.

Municipal Law is defined as a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong. (Blackstone.)

A more concise and accurate definition is — that rule of civil conduct recognized by the governing power in a state which it will enforce or sanction.

This is the meaning of the term Law as usually used in jurisprudence.

It is a *rule* and not a *sentence*, which is a transient, sudden order from one person in authority to another over whom he exercises that authority.

It is a *rule* and not *advice* or *counsel*, which we are at liberty to follow or not as we desire.

It is a *rule* and not a *compact* or an *agreement*, which is a promise proceeding from us and thus the result of our own volition.

It is a *rule of conduct* and not of *faith* or *belief*, as that acts within the breast of the person and may exist independent of any outward manifestation.

It is a *rule of civil conduct*, that is, it regards the man as a member of society and as bound to duties which are obligatory upon him as a citizen, besides those of morality.

It is a *rule recognized*, for unless it were so, it could not have the sanction necessary to make it obligatory upon the member of civil society; and it is recognized to be the rule of human action controlling him as a member of such society.

Civil society can not exist without government as necessary to preserve it and keep it in order; hence, government of some sort followed immediately upon the organization of society. In truth, government and society seem to have been co-eval and we can find no trace of a time when government did not exist.

But the very term government implies a governor.

Thus government cannot exist without a supreme power to determine the duties incident to citizenship, or membership in civil society, and be this supreme power the whole community, a select few, or a single individual, it is called the *governing power*.

The powers exercised over the citizen by the supreme or governing powers vary, and it is from this difference or variance that governments are classified as (1) A DEMOCRACY; (2) AN ARISTOCRACY; (3) A MONARCHY; (4) or a MIXTURE or MODIFICATION of all or either.

A Democracy is where the sovereign power is lodged in an aggregate assembly, consisting of all the free members of a community or state.

An Aristocracy is where the sovereign power is lodged in a council composed of select members.

A Republic is where the sovereign power is exercised by an assembly chosen, after a certain method or plan, by the people of a state or community.

A Monarchy is where the sovereign power is entrusted in the hands of a single person.

Municipal Law is that rule of civil conduct recognized by the *sovereign power in a state, which it will enforce or sanction.*

It is then (1) DECLARATORY, whereby it clearly defines and lays down the rights to be observed and the wrongs to be eschewed.

It is (2) DIRECTORY, whereby it commands the observing of these rights and the abstaining from these wrongs.

It is (3) REMEDIAL, whereby a method is pointed out to recover a man's private rights and redress his private wrongs.

It has (4) a SANCTION, which is the evil or punishment that may attend the breach of legal duties.

Municipal Law is composed of the LEX NON SCRIPTA (Unwritten Law), and the LEX SCRIPTA (Written Law).

The LEX NON SCRIPTA consists (1) of GENERAL CUSTOMS, which compose the universal rule of the whole community or state, and form the Common Law in its stricter and more usual significance.

It consists (2) of PARTICULAR CUSTOMS, those which affect only the inhabitants of particular districts, or only particular classes of persons or particular classes of things, also (3) CERTAIN PARTICULAR CUSTOMS observed in particular courts, as in courts ecclesiastical, military, and admiralty.

It is called *LEX NON SCRIPTA*, or Unwritten Law, not because it is *oral* and transmitted by tradition, but because its original institution is not set down in writing, it being contained in the records of courts of justice, in books of reports of judicial decisions, and in text-writers of authority.

In the United States the Unwritten Law has received its authoritative sanction in the decisions of the courts, and it embraces the larger portion of our Municipal Law; and it is a rule universally recognized that when the supreme judicial authority of a state utters a principle, which has not before been determined, such principle is not a new rule or new law, but is supposed to have been contained within the body of the Unwritten Law from time immemorial.

A second branch of the Municipal Law is the *LEX SCRIPTA*, or WRITTEN LAW, also known as the STATUTORY LAW.

The *LEX SCRIPTA* is either (1) GENERAL, or such that concerns the whole community; (2) SPECIAL, or such that concerns but a small portion of the community.

It is also (1) DECLARATORY, setting forth the *Lex non Scripta* where it may have fallen into disuse, or become uncertain. (2) REMEDIAL, supplying the defects or retrenching some imperfections in the *Lex non Scripta*, and as remedial it either enlarges or restrains. Then as doubts may arise as to the intention of the Law, it is necessary to determine what was in the mind of the legislator, that caused him to enact the law. Hence this rule or law is interpreted by the (1) WORDS; (2) CONTEXT; (3) SUBJECT MATTER; (4) EFFECT AND CONSEQUENCES; (5) REASON and SPIRIT.

The **WORDS** are to be understood generally in their usual and most known signification, and not so much as regards the propriety of grammar.

The **CONTEXT**, as being of singular use to compare a word or sentence with whenever it may appear ambiguous or equivocal.

The **SUBJECT MATTER**, as clearly giving the idea in the mind of the legislator and to which his expressions are directed.

The **EFFECT** and **CONSEQUENCES**, pointing out the necessity of departing from the usual signification of words, if in their literal meaning they have an absurd signification.

The **REASON** and **SPIRIT**, being the cause of the enacting of the law or that led the governing power to adopt it, "for," says Blackstone, "when this reason ceases, the law (or rule) itself ought likewise to cease."

It may be well to mention here a few of the more important rules which should be observed in the construction of every statute.

1. In all remedial statutes, the old law, the mischief and the remedy should be considered.
2. One part of a statute should be so interpreted that the whole may stand.
3. Where the common law and a statute are in conflict, the common law gives place to the statute, and an old statute gives place to a new one.
4. If a statute that repeals another is itself repealed, the prior statute is thereby revived, and if a statute that takes the place of the common law is repealed, the common law rule again becomes the law.
5. A saving totally repugnant to the body of the act, is void.
6. Penal statutes must be strictly construed.

The law-making power of the United States is Congress, composed of two houses, viz.: the Senate and House of Representatives; of the States, it is a General Assembly composed of two similar bodies.

The formal steps in the making of a law are:

- (A) The act is presented by a member.
- (B) It is referred to a committee.
- (C) If they are favorable, it has three readings.
- (D) If agreed to, it is engrossed and sent to the other house.
- (E) If they agree to it, it is usually sent to the Executive for his sanction or signature.
- (F) If given, he signs same.

The *rules* or *ordinances* or *regulations* of a city do not compose the municipal law, and such title when given them should not confuse; a better name would be *municipal ordinances*.

For a citizen of the State of Iowa, the Municipal Law includes the Constitution, Statutes and Treaties of the United States, the Constitution and Statutes of the State of Iowa, and the ordinances of the city wherein he may reside; also the Common Law as indicated by the decisions of the courts.

James A. Rohbach.

DETERMINABLE FEES.

A grant of lands to one person and his heirs so long as there shall be heirs of the body of another, is a common illustration of a fee upon limitation. A grant in this form would show a purpose to pass to the grantee an interest capable of descending by inheritance, and to endure until there should be no descendents of the person designated, and then cease. A grant of a lot to trustees and their successors forever, for the uses of the Methodist Episcopal Church of America, on which to erect a house of worship "for the use of the members of the Methodist Episcopal Church of America, so long as they use it for that purpose and no longer; and then to return back to the original owner," passed to the trustees a fee which expired upon an abandonment of the property as a place of worship.¹ The grant to A and B, their heirs and assigns, of a tract or parcel of land within a city to be opened as a public square within thirty years and to be thereafter forever kept open and used as a public square, and "provided always that if the said piece or parcel of ground shall not within thirty years from the date of these presents be so opened and appropriated as and for a public square as aforesaid, then and from thenceforth these presents shall cease and determine, and the estate hereby granted shall revert to the said Nicholas William Stuyvesant, his heirs and assigns * * *," conveyed a fee upon limitation.² The intention was to create in the grantees a fee to cease if the lot was not made into a public square within thirty years, or if after being opened it should at any time thereafter be abandoned as a square. So also a conveyance to a county of a tract of ground in a village, the county seat of the county, with this proviso, "that this land is sold for county purposes so long as the county seat remains in New Lisbon, and if at any time the county seat is removed from said village, then this conveyance to be void and of no effect, and the land reverts to the said parties of the first part," was a grant of a fee upon limitation, an estate to be at an

¹ *Henderson v. Hunter*, 59 Pa. 335.

² *Mayor etc. v. Stuyvesant*, 17 N. Y. 34.

end whenever the county seat was removed from the village.¹ In all these instances the estate conveyed is by the qualification annexed to the grant to endure until the happening of a future event or contingency, and not beyond it. When the specified limit is reached all the interest granted has been enjoyed, and nothing then remains in the grantee. This variety of determinable fee, called a fee upon limitation, could be created at common law.

Lands may be conveyed in such a way as to show that the grantee is to take the fee therein, to be continued in him, his heirs and assigns, upon condition that something specified shall be done or abstained from. This variety of fee is called a fee upon condition. This kind of determinable fee was also known to the common law.

A conveyance to one and his heirs on condition that there should never be any intoxicating liquors manufactured or sold as a beverage upon the premises, and providing for a forfeiture in case the condition was broken was a grant of a determinable fee upon condition.²

The sister of one about to make a conveyance owned the lot immediately adjacent on the north of the premises he was about to convey. The deed made by him created a fee simple with this qualification: "provided, however, this conveyance is upon the condition that no window shall be placed in the north wall of the house aforesaid (the house on the premises conveyed), or any house to be erected on the premises, within thirty years from the date hereof * * *." This was a grant of a fee upon condition. In a suit for possession by the grantor the placing of windows in the north wall of the house on the land granted within the time mentioned was held to be a breach of the condition, and the grantor was given a judgment restoring to him the property.³

A grant of land was made to one B "and his heirs and assigns forever," in consideration of five shillings and a yearly

¹ *Daniels v. Wilson*, 27 Wis. 492.

² *Plumb v. Tubbs*, 41 N. Y. 442; *Indian Orchard Canal Co. v. Stokes*, 8 Pick. 562; *O'Brien v. Wetherell*, 14 Kas. 616.

³ *Gray v. Blanchard*, 8 Pick. 268.

rental. The deed contained the stipulation: "if there should be a breach of any of the covenants of the grantee, it should be lawful for the grantor, his heirs and assigns, to re-enter and to have and enjoy the premises as of his former estate, and to put out and remove the grantee, his heirs and assigns; and in that case the indenture is to be void." This was a conveyance of a fee upon condition, and the estate conveyed was held to have been forfeited for breach of the condition, that is, for failure to pay rent.¹

A fee upon limitation is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happen upon which it is to fail.² A determinable fee on condition has attached to it something that must be done to prevent it from divesting, or that must be left undone on peril of its destruction.³ The contingency in the one case is the end of the interest granted; it is the cause, in the other case, for claiming a forfeiture of the interest granted. The limitation is determined when the specified event comes to pass because no greater estate was created. The duration of the fee upon condition is not bounded by the happening of the future contingency,—the thing to be done or omitted,—but it is revested in the grantor or his heirs by forfeiture on breach of the condition. The one interest is fully enjoyed. The other is cut short provided the forfeiture is claimed. There is sometimes difficulty in determining whether the estate conveyed is a fee upon limitation or one determinable upon condition. But whenever the language of the grant is found to mean that the fee is one having a future event as the boundary of its duration, the estate created is a fee upon limitation. If the language of the conveyance shows the intention to grant an estate in fee simple to be forfeited if something designated is not done or not omitted, the interest conveyed is a fee determinable on condition. In the margin are given a number of cases which

¹ *Van Rensselaer v. Ball*, 19 N. Y. 100; *Van Rensselaer v. Dennison*, 25 *id.* 393.

² 2 Blackst. Com. 155.

³ 1 Lead. Cas. in Am. L. of R. P. 186.

it would be well for the student to examine as an exercise in discriminating between these two kinds of determinable fee.¹

In Iowa a statute is in force requiring any owner of land who subdivides it for the purpose of laying out any town or city, or any addition thereto, to make and record a plat showing the manner of division.² The statute also provides that the acknowledgement and recording of such a plat, shall be equivalent to a deed in fee-simple of such portion of the land platted as is on the plat set apart for streets or other public use.³ Similar statutes are found in other states. It has been held in Iowa that the abandonment by the corporation of such parts thus dedicated to streets, etc., does not cause the fee thereof to revert to the dedicator; that notwithstanding the the corporation may have ceased to devote the land to the uses for which it was dedicated, the fee remains in the city, subject to injunction by the original owner or other person injured by any attempt of the city to use it for other purposes than those intended.⁴ On the other hand the Supreme Court of Illinois⁵ has held that where a street in fee passed to the city by recording a town plat, the vacation of such street caused the fee to revert to the original proprietor, not to the abutting owners. In Ohio the effect of abandonment of the property conveyed in fee by such a dedication is also held to put the fee again in the grantor or his heirs.⁶ The dedication in Iowa can not be said to pass a determinable fee, while it certainly does according to the decisions in the states of Illinois and Ohio. Without provision in the statute for the disposition of the fee in the event the city abandon the use of the land for the purpose for which it was conveyed, the best reason for holding that such abandonment causes the fee to revert to the

¹ *Lessee of Sperry v. Pond*, 5 Oh. 398; *McKelway v. Seymour*, 20 N. J. L. 321; *Sharon Iron Co. v. Erie*, 41 Pa. 341; *Bolling v. Mayor of Petersburg*, 8 Leigh, 294; *Scheetz v. Fitzwater*, 5 Pa. 126; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Indianapolis, Peru &c. R'y Co. v. Hood*, 66 Ind. 590; *Scott v. Stipe*, 12 Ind. 74; *Gulld v. Richards*, 16 Gray, 309; *Jackson v. Topping*, 1 Wend. 388; *Balley v. Wells*, 82 Iowa, 181.

² Code of Iowa, Sec. 559.

³ Id. Sec. 561.

⁴ *Pettingill v. Devins*, 35 Iowa, 244.

⁵ *Gebhardt v. Reeves*, 75 Ill. 301.

⁶ *Board of Education v. Edison*, 18 Oh. St. 221.

dedicator is that the land was given on condition that it be used for the purpose designated.

Fees on limitation and fees upon condition are estates capable of sale and conveyance and will pass by descent like fees-simple. They may last forever. But if the event which marks the limit of the one, or if the contingency that is to cause the forfeiture of the other, occur the grantor may have his estate again in whosoever hands it may then be. The grantor of one of these fees, however, keeps no part of the estate. The grantee takes the whole estate. This is the common law conception of these interests. At common law there could not be a grant of the fee in land either upon condition or upon limitation to one and a remainder in the same land to another. There was no *reversion* of estate out of which a remainder could be conveyed after one of these determinable fees. If the fee granted upon limitation was determined, the creator of it or his heirs had back the estate as it was before the grant. If the fee upon condition was forfeited the same consequence followed, provided the grantor or his heirs entered for the breach, or took some equivalent action. There remained with the grantor therefore whenever either of these fees was created a right in the nature of a reversion. This right was not an estate. It was not liable to sale for his debts; he could not convey it. It passed by descent to his heirs. It had the nature of a reversion, but it was not a reversion. At common law therefore an estate in fee upon limitation terminating, no purchaser from the grantor could claim the estate. The same was true of an estate in fee upon condition being forfeited. In either case there could be no acquisition of the interest by a stranger. In other words the event causing the cessation of the interest granted, brought into existence no estate in a stranger. At common law, inasmuch as the only future estates known and capable of creation were reversions and remainders, an estate could not be created to arise in a third person when the event happened which determined a fee upon limitation; nor could a provision be made in granting a fee upon condition that upon breach of the condition a third person should have an estate in

the land granted. Thus at common law an estate conveyed to A and his heirs so long as B had heirs of his body, then to C and his heirs, would be an attempt to create a particular estate in A and a remainder in C upon the extinction of the heirs of the body of B. The provision intended for C and his heirs would not be effectual. It would be a remainder after a fee upon limitation. It would not be possible to-day to make a valid provision that, after a grant such as the second illustration above shows had terminated, an interest in the lot should vest in a third person had not there been an increase in the capacity to dispose of real estate under the common law. To-day in granting a lot in fee on condition that there should never be any intoxicating liquor sold as a beverage thereon and in case there was at any time a breach of such condition then the lot should become the property of some third person or his heirs, the provision for the third person would be invalid, (without the present rule against remoteness) if an owner's power of disposition was no greater now than it was at common law.

After the enactment of the Statute of Wills in 32 Henry VIII, lands could be disposed of by will. From the Conquest down to the passage of that statute except in particular localities legal interests in lands could not be devised in England. After this enactment an estate in fee could be devised to one so qualified that upon the happening of an event designated it should cease to be his property and become the property of another, and the provision for the latter would be enforced. Though the estate to the first devisee was in fee, a valid subsequent estate thus become possible. The estate to arise in the place of the first fee upon the happening of the specified contingency was not called a remainder. That term retained its original meaning. It was an executory devise—executory because it was an estate in expectancy—devise because it was created by will. In *Pells v. Brown*¹ a father dying left three sons, Thomas, Richard and William. By his will he devised lands in this manner: "To Thomas his son and his heirs for-

¹ Croke Jac. 590.

ever, paying to his brother Richard twenty pounds at the age of twenty-one years; and if Thomas died without issue, living William, his brother, that then William his brother, should have those lands to him and his heirs and assigns forever, paying the said sum as Thomas should have paid." Here the provision for William was not a remainder because the devise to Thomas was a fee. But the court held that upon Thomas dying without issue in the lifetime of William, the latter took, as contemplated by the provision in his behalf, a fee in the lands. The devise for William was an executory devise. Here the estate given by the will to Thomas was to cease at his death, provided he should die without issue and while William was living. This is a fee upon limitation. But here the same contingency that marks the end of this limitation brings into existence a new estate. Had the interest left by the father to Thomas been an estate for life, or in fee tail, then the expectancy in the son William would have been a remainder. But the devise to Thomas being a fee, a remainder to William was impossible. By the operation of the Statute of Wills, therefore, a fee could be limited by an executory devise. A devise of land to testator's son, Passmore, his heirs and assigns forever with this qualification: "In case my son Passmore should die and leave no lawful issue, then I will and devise the aforesaid lot or plantation to my daughter Elizabeth (if she shall then be living) and to her heirs and assigns forever; and in case my said daughter Elizabeth should die and leave no lawful issue, in that case my will is that the said land shall be equally divided in fee-simple among my children that shall be then living."¹ This was a devise in fee limited by an executory devise. Other examples of fees limited by executory devises are found in the cases named in the margin.²

For a long time prior to 1535, in England, it would have been easy to find valuable lands the legal titles to which

¹ *Langley v. Heald*, 7 W. and S. 96.

² *Magnum v. Plester*, 16 S. C. 316; *Lessee of Thompson v. Hoop*, 6 Oh. St. 431; *Kennedy v. Kennedy*, 29 N. J. L. 185.

were in persons not entitled to the profits yielded by the land. The benefits of ownership would belong to others. In other words as to such lands there existed a barren unproductive ownership called a legal estate separate from the beneficial interest called an equitable estate or, more specifically, a use. The owner of the use was called the *cestui que use*. His interest was recognized in chancery only and not in the common law courts. The court of chancery treated him as the real owner and supplied him remedies by which he was secured his estate—the profits of the land. In the law courts the person holding the title to the land itself was the only owner known. For example, one the owner of land in fee-simple, in which as yet there was no use or equitable estate in another, could make a common law conveyance, a feoffment, to a grantee, say A, in fee for the use of another say, B and his heirs, or in trust for B and his heirs, and thus vest in the feoffee, A, the legal estate in fee, and in the *cestui que use*, B, the equitable estate, or use. Then by the rules and principles of the court of chancery, B was entitled to the benefits of ownership. Or, the owner of such lands could make a declaration that he stood seised of the lands for the use of B and his heirs without conveying them and create a use in B. A use being thus created it could be conveyed or assigned by B and the assignee would become the *cestui que use*. The feoffee in the one case, the one declaring the use in the other case could make a common law conveyance of the legal estate and the person who took the same with knowledge of the use would be held accountable in chancery to the *cestui que use* to the same extent as his grantor. The use having been raised for B and his heirs, if B died while owning it the heirs took it by inheritance. The legal estate having been a fee, the heirs of its owner, in case he died without conveying it, took such legal estate by inheritance and were required also to account to the *cestui que use* for the profits. Prior to the enactment of the Statute of Wills the owner of a use could make a valid disposition of it by his last will and testament. One owning a fee-simple

estate in a use could create a life estate therein to another, or a particular estate in one for life and in another a remainder. He could convey the use in fee-simple or in fee tail. He could convey the use in fee upon limitation or in fee upon condition. He could in short convey it as though it was a legal estate. But he could convey it or a part of it qualified and limited in a way unknown to the common law. No livery of seisin was essential in granting a free-hold interest in it. Hence an estate *in futuro*, not preceded by a particular estate, could be carved out of it and conveyed. An estate in fee in it could be conveyed which *upon the happening of a contingency should cease, and another estate therein arise in its place.*

During the time mentioned one owning the fee-simple in land who wished to create estates in use therein could make a common law conveyance — a feoffment — to B for the use of one *cestui que use* for life, the remainder for the use of another *cestui que use* in fee, etc. He could specify uses analogous to all the varieties of legal estates possible at common law. He could make the legal estate in B subject to a use *in futuro* without a preceding estate in use to support it. He could make the legal estate in B subject to a use in fee in one *cestui que use* which *on the happening of a contingency should cease and an estate in another cestui que use arise in its place.* A use *in futuro* unsupported by a preceding use, and which does not by its vesting cut short a prior estate, is a Springing Use.¹ A use which vests upon the happening of a contingency, and by vesting defeats a prior use as provided in the conveyance, is a Shifting Use.²

In 1535 the Statute of Uses was passed. It was the purpose of Parliament in enacting this statute to destroy uses, by making them legal estates. The act was so construed by the courts, however, that it did not destroy all uses. It provided in effect that the *cestui que use* should be the owner of the legal estate of which he had the use. There was no prohibition against conveying lands to be

¹ Tiedeman on R. P. § 483.

² Id. § 484.

held to uses. Uses could be created or raised as before, but as a general rule they became legal estates by operation of this statute, instead of uses as before. One wishing to convey a legal estate after the passage of this statute could proceed as before when intending to create a use, and by the operation of the statute the grantee took a legal estate, provided the limitation of the use permitted the statute to operate. And one who wished to create a trust estate now conveyed as before when raising a use, but limited the use in such a way that the statute could not under the construction it received unite the legal estate in the use.

A shifting use could not become a legal estate until the contingency on which it was to arise came to pass. When the contingency happened it drew to itself the legal estate, and the estate preceding it ended. If the preceding estate was a fee the shifting use terminated it as well as it would have done had it been less than a fee.

B enfeoffed G and others for the use of the feoffees themselves and their heirs, upon condition that if the feoffees did not pay B 2000 pounds within fifteen days then immediately after the fifteen days the feoffees should stand seised of the land for the use of B and his wife for their lives, and afterwards to the use of B's second son in tail with other remainders over.¹ This was a conveyance of a fee determinable by a shifting use.

Therefore, with the additions to the law of the Statute of Uses, in 1535, and the Statute of Wills, in 1540, fees determinable could be created by will: (1) upon limitation as by feoffment at common law; (2) upon condition as by feoffment at common law; (3) by providing executory devises to destroy them upon the happening of a specified contingency, not too remote; and (4) by a provision for a shifting uses to arise in their place upon the happening of a contingency, not too remote; and by deed: (1) upon limitation as at common law; (2) upon condition as at common law; (3)

¹ 1 Leon. 204. See also Sanders on Uses and Trusts, 155-159.

by conveyance to uses with a provision for a future use to arise and take the place of the preceding use on the happening of event designated or contingency. Determinable fees at common law are followed by the grantor or his heirs resuming the estate. Determinable fees due to the operation of the statutes referred to are followed by estates invested in third persons. Executory devises and shifting uses must not be so remote that they may not vest during the life or lives of people in being and twenty-one years thereafter.¹

Samuel Hayes.

¹ *Battle Square Church v. Grant*, 3 Gray, 142; *Sears v. Russell*, 8 Gray, 86; *Stuart v. Evans*, 30 Ind. 30; *Tiedeman on R. P.* § 544. As to remoteness affecting the validity of condition, see *Gray on Rule Against Perpetuities*, §§ 299-311. As to the validity of possibility of reverter, see *Id.* §§ 31-41.

ESTOPPEL IN PAIS AS AGAINST PERSONS NON SUI JURIS.

The rule that estoppel *in pais* is not applicable to persons *non sui juris*, is laid down by many writers upon the subject of estoppel, and recognized by many decisions of the highest courts, but the exceptions, real and apparent, are so numerous that a careful investigation of the question is warranted.

The limits of this article preclude other than a general review of the authorities upon this question. The effect of estoppel *in pais* is the creation of a contract. The consent is implied from the conduct, which being acted upon becomes conclusive. The central element of *estoppel in pais* is the conduct; the action, or the failure to act; the speaking or the silence. The equitable principle upon which estoppel is based necessarily contemplates that a person to be estopped by his acts must be competent to act with reference to the subject matter, and in this view was decided the case of *Lowell vs. Daniels*.¹ The court says: "We think a married woman can not do indirectly what she can not do directly; can not do by acts *in pais* what she can not do by deed; can not do wrong-

¹ 3 Gray, 151; 61 Am. Dec. 448.

fully what she can not do rightfully. She can not by her own act enlarge her legal capacity to convey an estate."

Considering the liability of infants the Supreme Court of the United States is equally strong in holding that estoppel does not apply.¹ "The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way.

An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity can not be an equivalent for capacity."

It is to these two classes of persons under disability that the doctrine of estoppel is frequently sought to be applied, and as, in reference to their ability to contract, the rights of married women, under common law disability, and infants, are not dissimilar, the cases involving the rights of both may be considered together.

In an early case in California,² the court, considering the liability of a *feme covert*, announces a rule conforming to that laid down in *Lowell vs. Daniels*, and in a later case³ it was held that estoppel *in pais* has no application to infants. But in a late case in Tennessee⁴ the doctrine of these cases is expressly disapproved, and in announcing the rule that persons under disability are subject to the operation of estoppel, it is said that the conduct may be "sufficient to create an estoppel entirely independent of, and altogether outside of any idea or claim of a contract." And the reason for the apparent conflict in the cases is said to be a failure to draw a distinction between a case where it is sought to "validate those contracts," which by law are declared void, and where it is sought to prevent a person by his conduct from asserting a right—holding that in the former an estoppel will not arise, but that in the latter the disability is no protection.

¹ *Sims v. Everhardt*, 109 U. S. 300.

² *Morrison v. Wilson*, 18 Cal. 494; 73 Am. Dec. 533.

³ *Lackman v. Wood*, 25 Cal. 147.

⁴ *Galbraith v. Lumford*, 37 Tenn. 59.

Opposed to this theory is the case of *Upshaw vs. Gibson*.¹ An infant was present at the sale, by her husband, of her personal property. No objection was made by her and no notice given to the buyer. It was held that she was not estopped. Also the case of *McBeth vs. Trobue*,² in which infants are held not estopped by acquiescence in the use of a highway which was traveled through land owned by them. The observation of the Supreme Court of Penna.³ in this connection is in point: "No multiplication of deeds (and they are the most solemn acts *in pais* by which title can be transferred) will serve to ratify the void conveyance unless made according to statutory direction; much less can express ratification by parol or expressions of satisfaction infuse life into that which has no vitality. How then is it possible mere acts can be more efficacious that merely indicate the intention to transfer, which the writing has already expressed in terms explicit and emphatic? Acquiescence in, or knowledge of the invalid act, cannot be invested with greater virtue or vigor than the deed itself by which the act was done. The policy of the law which denies the capacity to do the act, as clearly denies the capacity to confirm it, except in the legal mode."

On the other hand, in the case of *Dann vs. Cudney*,⁴ the Supreme Court of Michigan, considering a case where a horse was sold by the husband of the plaintiff, and afterwards and before the payment of the purchase price, the wife acquired knowledge of the sale and allowed the purchaser to pay the purchase money without objection, held that she was estopped from asserting title to the property. It is held in another case that the silence of a *feme covert* may prejudice her rights. "It was objected, however, that the equity of redemption belonged to the wife, and that her silence should not prejudice her rights. In other words, that when a woman gets married she obtains a license to commit a fraud; such is not, and ought not to be the law."⁵

¹ 58 Miss. 841.

² 69 Mo. 642.

³ *Glidden v. Strupler*, 58 Pa. St. 400.

⁴ 18 Mich. 239. 37 Am. Dec. 755.

⁵ *Bradley v. Schneider*, 14 Ill. 263; 53 Am. Dec. 564.

The Supreme Court of Kentucky in a recent case,¹ reviewing the former decisions of that State, holds that a *feme covert* may be estopped by her acts from asserting title to property. In a previous case² the same court holds: "If a party having an interest in preventing an act being done, acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no right to challenge the right to their prejudice. (Citing 2 Story Eq. Jur. 756.) *A fortiori* is this so, when as in this case the party complaining of the act to his prejudice has procured it to be done by representation of facts inconsistent with his subsequent claim, and married women are not exempt from the operation of this rule."

But in other cases³ the same court has held that a married woman may recover property sold by her during coverture upon reimbursement of the purchase money and payment for such necessary improvements as may have been made in good faith.

The Supreme Court of Pennsylvania has considered the question of estoppel *in pais* with reference to persons under disability in many cases.

In Glidden vs. Strupler, *supra*, it was held, that although a married woman sold land and received the purchase money, and the purchaser made improvements with her knowledge and encouragement, she was not estopped from recovering the land. To the same effect is a case in the Supreme Court of Illinois.⁴ But in later cases in both of those States it is held, that although as a general rule the doctrine of estoppel *in pais* does not apply to persons *non sui juris*, that the rule is by no means of universal application.⁵

In Grim's Appeal it is held, that to allow a married woman to deny the effect of estoppel would be to allow her to perpe-

¹ McDonald v. Landrem, 87 Ky. 404; 19 Am. St. Rep. 500.

² Stone v. Werts, 8 Bush. 486.

³ Heck v. Fisher, 78 Ky. 648; Hawkins v. Brown, 80 Ky. 186.

⁴ Rogers v. Higgins, 48 Ill. 212.

⁵ Fryer v. Rishell, 84 Pa. St. 531; Brown's Appeal, 94 Pa. St. 363; Grim's Appeal, 105 Pa. St. 335; Bigham's Appeal, 122 Pa. St. 363; Oglesby Coal Co. v. Pasco, 79 Ill. 164.

trate a fraud. It is said: "A married woman should be held to be observant of that good faith in her dealings with the world to which others are bound; her protection is for the prevention of fraud. She should not thereby be enabled with impunity to defraud others."

In Indiana the cases are marked by the same lack of uniformity as in Pennsylvania.

In *Lane vs. Schlemmer*,¹ a late case, reviewing all of the former decisions of the court, it is said: "When to permit a married woman to deny what she has positively affirmed, would operate as a fraud upon one who had acted in good faith, she will be held to be estopped. It may be that the mere silence when she should speak will not create an estoppel, but where she makes positive representations and thus misleads one who acts in good faith, an estoppel will arise." But the doctrine of this case is of little weight as an authority except in so far as it reflects the ruling in former decisions of the same court, for the reason that in that State married women are declared by statute to be subject to estoppel *in pais* like any other person.²

Many of the the Indiana cases, however, were decided before the enactment of this statute. In one case³ it appeared that an infant *feme covert* joined with her husband in selling land to a railroad company, by which it was afterwards conveyed without her knowledge to the defendant. After the removal of the disability she commenced an action to recover possession of the land. Some improvements had been made without her knowledge, although she had resided within four miles of the land for two years after attaining her majority. It was held that she was not estopped to claim the land. The enactment of the statute was evidently prompted by the lack of uniformity in the adjudicated cases upon this question.

Many cases hold that persons under disability are not subject to estoppel *in pais*, except their conduct is intentional and

¹ 114 Ind. 396; 5 Am. St. Rep. 681.

² Revised Statutes of Ind. 1881, Sec. 5017.

³ *Miles v. Lingerian*, 24 Ind. 335.

fraudulent.¹ But it will be observed from many of the above cases that such rule is not universally recognized.

Other authorities hold that the doctrine of estoppel does not apply except in case of a pure tort. This is the conclusion which Bigelow, in his valuable work upon Estoppel, draws from the cases: "We have considered the case of infancy to some extent and have seen that an infant cannot be estopped by any course of conduct which would not work an estoppel upon a married woman; that is, he can only be estopped, if ever, in the case of a pure tort." The author refers to numerous cases in which the doctrine of estoppel is held to have no application whatever to infants.²

On the other hand, cases are found which hold that the infant who has attained years of discretion, may, by his conduct in permitting or encouraging a purchaser to buy from another his property, at the same time concealing his title, is estopped from afterwards asserting title thereto.³

It will be observed that most of the cases where the question of estoppel as to *femes covert* and infants has been considered are those in which the party seeks in a court of equity to avoid a deed or contract made during disability, and acquiesced in until the disability was removed, without, however, tendering to the claimant of the property the consideration received, or offering to put the purchaser in *statu quo*. In most of these cases the court holds that the person is estopped.

The reason for applying estoppel in this class of cases is well stated in *Rosenthal vs. Mayhugh*,⁴ as follows: "Equity recognizes a separate existence of the wife even under all the disabilities of coverture, and regards her as a rational and responsible subject of its jurisdiction, entitled to its protection and amenable to the decrees of a court of conscience." But to this thought Ames J. responds: "The defendants insist that the claim of the plaintiff is inequitable, and that for that reason she is not entitled to the aid of a court of equity in its enforce-

¹ *Kane Co. v. Herrington*, 50 Ill. 232; *Schnell v. Chicago*, 33 Ill. 322; *Schwartz v. Saunders*, 46 Ill. 12; *Coon v. Smith*, 3 Hill, 147.

² Bigelow on Estoppel, pp 490-91

³ 2 Sugden on Vendors (914 Eng. Ad. page 745); 1 Story Eq. Jur. §§ 363, 396; *Alsworth v. Cord* 2, 31 Miss 32.

⁴ 33 Ohio St. 155.

ment. But there is no equitable construction of a contract or duty, different from the legal one, and the same thing is true in the construction of statutes. 2 Story Eq. Jur. Sec. 1584. A court of equity has no more jurisdiction than a court of law to recognize and give effect to instruments which, by statute, are inoperative. *Townsley vs. Chapin*, 12 Allen 476. The provision of the General Statutes above cited was undoubtedly intended for the protection of the rights of married women, and was for many years a part of the settled policy of the law. We are not prepared to hold that the assertion by the plaintiff of a clear legal right is in itself inequitable in such a sense that her remedy in equity ought to be denied."¹

Among the cases are frequently found those in which a *feme covert* induces a person to contract with her upon the positive representation that she is *sole*; and it is generally held that she is not estopped to assert coverture. To this class belongs the first case cited herein,² which has been followed by the Supreme Court of Massachusetts in numerous cases.³

Contracts made with an infant upon the representation that he has attained the age of majority, are held to be void, and the infant is held to be not estopped by such representations.⁴ "A contrary doctrine," says Sanford J. in *Brown vs. McCune*, 5 Sand. 224, "would overturn the whole law relative to the contracts of infants. From holding that an infant was estopped by a falsehood as to his age, the next step would be to hold him estopped by a suppression of the fact that he was under age when he was silent upon that point, when he knew that the party with whom he was contracting supposed him to be of age. There is no difference between the direct and the inferential falsehood. The one is as fraudulent as the other."

For the same reason a grantor is not estopped from disaffirm-

¹ *Merriam v. Railway Co.* 117 Mass. 341.

² *Lowell v. Daniels*, *supra*.

³ *McGregor v. Wait*, 10 Gray, 75; *Bemis v. Call*, 10 Allen, 517; *Plumer v. Lord*, 9 Allen, 517; *Plumer v. Lord*, 9 Allen, 457; *Pierce v. Chase*, 106 Mass. 239; *Pells v. Webquish*, 139 Mass. 472.

⁴ *DeRoov v. Foster*, 12 Com. B N. S. 272; *Conroe v. Birdsall*, 1 Johns. Cas. 137; 1 Am. Dec. 105; *Brown v. McCune*, 5 Sand. 224; *Burley v. Russell*, 10 N. H. 184; 24 Am. Dec. 146; *Merriam v. Cunningham*, 11 Cush. 40; *Carpenter v. Carpenter*, 45 Ind. 142; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412.

ing her deed on the ground of infancy and maintaining an action to recover the land by a false recital in the deed that she was "unmarried and of age."¹ "To hold that he is estopped by such representations from avoiding the contract by asserting his infancy, would be an exception to the rule governing this class of cases. Such representations cannot be of any greater force to bind the plaintiff than the contract itself."²

Many other cases are found in which the subject of estoppel is considered,³ but an examination of the same would not tend to the ascertainment of any definite rule.

Pomeroy concludes: "The tendency of modern authority, however, is strongly toward the enforcement of an estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal as though they were single. Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right or to maintain a defense."

And as applied to infants, it is said: "The disability of infants seems to have limited the operation of the equitable estoppel more than that of coverture. Since an infant is not directly bound by his ordinary contracts unless ratified after he becomes of age, so obligations in the nature of contract will not be indirectly enforced against him by means of an estoppel created by his conduct while still a minor. On the other hand, an equitable estoppel arising from his conduct may be interposed with the same effect as though he were adult, to prevent him from affirmatively asserting a right of property,

¹ *Wieland v. Kobiak*, 110 Ill. 16; 51 Am. Rep. 676.

² *Whitcomb v. Joslyn*, 51 Vt. 89; 51 Am. Rep. 678.

³ *Keene v. Coleman*, 99 Pa. St. 399; *Wethersby v. Faffar*, 97 N. C. 118; *Hodges v. Powell*, 96 N. C. 64; 60 Am. Rep. 401; *Behler v. Weyburn*, 59 Ind. 145; *Bank of America v. Banks*, 101 U. S. 240; *Burdett v. Williams*, 30 Fed. Rep. 697; *Rice v. Boyer*, 9 N. E. Rep. 430; *Neff v. Landus*, 1 Atl. Rep. 177; *Vogelsand v. Null*, 3 S. W. R. 450.

or of contract in contravention of his conduct upon which the other party has relied and been induced to act.¹

The conclusion of Bishop in his work on Contracts, Sec. 903, is that "in the ordinary case he (the infant) is concluded by an estoppel *in pais* to the same extent as though he were of full age. For example, if having arrived at years of discretion he stands by and sees a third person sell his estate without disclosing his infancy, or other defects in the title, he is bound through the same law of estoppel which in like circumstances would hold an adult. The doctrine that infancy is no protection against fraud leads necessarily to this consequence."

But it will be found that the authorities cited sustaining the above, consists largely of cases where the action was in tort, and where damages were sought to be recovered because of false representations.

Cases in which estoppel *in pais* is the sole question involved are few. Throughout all the authorities the question is hopelessly mingled with disaffirmance of contracts by infants and acquiescence in contracts by *femes covert* after the removal of disability. Adding to the confusion are the statutory enactments of the various states relative to the rights of married women, and the modification by statute of the common law rule governing the conduct of infants.

The careful student will first ascertain the *status* which the infant or *feme covert* occupies under the statutes of the state in which the question arises. This ascertained, a careful study of the cases will enable him to determine whether under the particular facts involved the doctrine of estoppel will be held to apply.

Martin J. Wade.

¹ 2 Pomeroy's Eq. Jur., Sec. 814, 815.

CASES ON INSURANCE.

[The purpose in the preparation of this list has been to give the student cases which he may read to advantage, and which will, together, cover the principal topics of the subject. Where the same case relates to different topics, it is cited under one head only. The student should have some notion of the whole subject before commencing to read the cases and then might with advantage make note of the points decided in each case with reference to other topics as well as the one in connection with which the case is given.]

I. FIRE INSURANCE.

1. NATURE OF THE CONTRACT; INSURABLE INTERESTS; REINSURANCE.

Nature, in general.

- Wilson v. Hill, 3 Met. 66.
- Carpenter v. Providence-Wash. Ins. Co. 16 Pet. 495.
- Aetna F. Ins. Co. v. Tyler, 16 Wend. 385; 30 Am. D. 90.
- Lane v. Maine Mut. F. Ins. Co. 12 Maine, 44; 28 Am. D. 150.
- Mills v. Farmers Ins. Co. 37 Iowa, 400.
- Wood v. Rutland Mut. F. Ins. Co. 31 Vt. 552.

Insurable interest.

- Carter v. Humboldt F. Ins. Co. 12 Iowa, 287.
- California Ins. Co. v. Union C. Co. 133 U. S. 387.
- Shaw v. Aetna Ins. Co. 49 Mo. 578; 8 Am. R. 150.
- Sawyer v. Dodge Co. Mut. Ins. Co. 37 Wis. 503.
- Strong v. Mfrs. Ins. Co. 10 Pick. 40; 20 Am. D. 507.
- Richland Co. Mut. Ins. Co. v. Sampson, 38 Ohio St. 672.
- Williams v. Roger Williams Ins. Co. 107 Mass. 377; 9 Am. R. 41.
- Traders Ins. Co. v. Roberts, 9 Wend. 404.
- Haley v. Mfrs. Ins. Co. 120 Mass. 292.
- Excelsior F. Ins. Co. v. Royal Ins. Co. 55 N. Y. 343; 14 Am. R. 271.
- Norcross v. Ins. Co. 17 Penn. St. 429; 55 Am. D. 571.
- Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568; 29 Am. R. 271.
- Bishop v. Clay F. and M. Ins. Co. 49 Conn. 167.
- Warren v. Davenport F. Ins. Co. 31 Iowa, 464; 7 Am. R. 160.
- Riggs v. Com'l Mut. Ins. Co. 125 N. Y. 7; 21 Am. St. R. 716.
- Merritt v. Farmers Ins. Co. 42 Iowa, 11.
- Lynch v. Dalzel, 3 Brown, P. C. 497; 1 Bennett, F. Ins. Cases 1.
- Saddlers Co. v. Badcock, 2 Atkins, 554; 1 Bennett, F. Ins. Cases 7.
- Stetson v. Mass. Mut. F. Ins. Co. 4 Mass. 330; 3 Am. D. 217.
- Worthington v. Bearse, 12 Allen, 382; 90 Am. D. 152.

Reinsurance.

- Merry v. Prince, 2 Mass. 176.
- New York etc. Ins. Co. v. New York F. Ins. Co. 17 Wend. 359.

Bartlett v. Fireman's Fund Ins. Co. 77 Iowa, 155.
 Blackstone v. Allemania F. Ins. Co. 56 N. Y. 104.
 Ill. Mut. F. Ins. Co. v. Andes Ins. Co. 67 Ill. 362; 16 Am. R. 620.
 Ins. Co. v. Ins. Co. 38 Ohio St. 11; 43 Am. R. 413,
 Johannes v. Phenix Ins. Co. 66 Wis. 50; 57 Am. R. 249.

2. THE MAKING OF THE CONTRACT AND, IN GENERAL, ITS CONSTRUCTION.

When becomes binding.

Sanborn v. Fireman's Ins. Co. 16 Gray, 448; 77 Am. D. 419.
 Trustees v. Brooklyn F. Ins. Co. 19 N. Y. 305.
 Relief Ins. Co. v. Shaw, 94 U. S. 574.
 Eames v. Home Ins. Co. 94 U. S. 621.
 Hubbard v. Hartford F. Ins. Co. 33 Iowa, 325; 11 Am. R. 125.
 Barre v. Council Bluffs Ins. Co. 76 Iowa, 609.
 Security F. Ins. Co. v. Kentucky etc. Ins. Co. 7 Bush, 81; 3 Am. R. 301
 Wales v. New York etc. Ins. Co. 37 Minn. 106.

Knowledge of terms.

Cleaver v. Traders Ins. Co. 71 Mich. 414; 15 Am. St. R. 275.
 Morrison v. Ins. Co. 69 Tex. 353; 5 Am. St. R. 63.

Construction.

Hood v. Manhattan Ins. Co. 11 N. Y. 532, 541.
 Merchants Ins. Co. v. Edmond, 17 Gratt. 138.
 Dole v. New Eng. etc. Ins. Co. 6 Allen, 373, 385.
 Western Ins. Co. v. Cropper, 32 Penn. St. 351, 355; 75 Am. D. 561.

Entire; divisible.

Loomis v. Rockford Ins. Co. 77 Wis. 87; 20 Am. St. R. 96.
 State Ins. Co. v. Schreck, 27 Neb. 527; 20 Am. St. R. 696.

3. REPRESENTATIONS AND CONCEALMENT; CONDITIONS; WARRANTIES; WAIVER.

Warranties and representations in general.

Ripley v. Aetna Ins. Co. 30 N. Y. 136; 86 Am. D. 362.
 Daniels v. Hudson River F. Ins. Co. 12 Cush. 416; 59 Am. D. 192.
 Cooper v. Farmers Mut. F. Ins. Co. 50 Penn. St. 299; 88 Am. D. 544.
 Kimball v. Aetna Ins. Co. 9 Allen 540; 85 Am. D. 786.
 Glendale Woolen Co. v. Protection Ins. Co. 21 Conn. 19; 54 Am. D. 309
 Dewees v. Manhattan Ins. Co. 34 N. J. 244.
 Ryan v. Springfield etc. Ins. Co. 46 Wis. 671.
 Columbian Ins. Co. v. Lawrence, 2 Pet. 25, 48.
 Lynchburg F. Ins. Co. v. West, 76 Va. 575; 44 Am. R. 177.
 Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; 22 Am. D. 567.
 Miles v. Conn. Ins. Co. 3 Gray, 580.
 Graham v. Fireman's Ins. Co. 87 N. Y. 69; 41 Am. R. 348.
 Ellis v. Council Bluffs Ins. Co. 64 Iowa, 507.
 Donnelly v. Cedar Rapids Ins. Co. 70 Iowa, 693.

Concealment.

- Burritt v. Saratoga Co. Mut. F. Ins. Co. 5 Hill, 188; 40 Am. D. 345.
Hardy v. Union Mut. F. Ins. Co. 4 Allen, 217.
Armenia Ins. Co. v. Paul 91; Penn. St. 520.
Carson v. Jersey City F. Ins. Co. 43 N. J. 300; 39 Am. R. 584.
Curry v. Commonwealth Ins. Co. 10 Pick. 535.

Overvaluation.

- Franklin Ins. Co. v. Vaughn, 92 U. S. 516.
Behrens v. Germania F. Ins. Co. 64 Iowa, 19.

Description.

- Wilkins v. Germania F. Ins. Co. 57 Iowa, 529.
Heath v. Franklin F. Ins. Co. 1 Cush. 257.
Am. Cent. Ins. Co. v. McLanathan, 11 Kans. 533.
Fowler v. Aetna Ins. Co. 6 Cow. 637; 16 Am. D. 460.
Bryce v. Lorillard F. Ins. Co. 55 N. Y. 240; 14 Am. R. 249.

Removal.

- Lyons v. Providence-Wash. Ins. Co. 14 R. I. 109.
Harris v. Royal Canadian Ins. Co. 53 Iowa, 236.
English v. Franklin F. Ins. Co. 55 Mich. 273; 54 Am. R. 377.
Peterson v. Miss. Valley Ins. Co. 24 Iowa, 494; 95 Am. D. 748.
Mills v. Farmers Ins. Co. 37 Iowa, 400.
McCluer v. Girard F. Ins. Co. 43 Iowa, 349; 22 Am. R. 249.
Longueville v. Western Assur. Co. 51 Iowa, 553; 33 Am. R. 146.
Holbrook v. St. Paul F. and M. Ins. Co. 25 Minn. 229.
Noyes v. Northern Nat. Ins. Co. 64 Wis. 415; 54 Am. R. 631.
Niagara F. Ins. Co. v. Elliott, 85 Va. 862; 17 Am. St. R. 115.
Brandbury v. Fire Ins. Assn. 80 Maine, 396; 6 Am. St. R. 219.

Use.

- Goddard v. Monitor Ins. Co. 108 Mass. 56; 11 Am. R. 307.
Wall v. East River Mut. Ins. Co. 7 N. Y. 372.
Martin v. State Ins. Co. 44 N. J. 485; 43 Am. R. 397.
Billings v. Tolland Co. Mut. F. Ins. Co. 20 Conn. 139; 50 Am. D. 277.
Stout v. City F. Ins. Co. 12 Iowa, 371; 79 Am. D. 539.
Mickey v. Burlington Ins. Co. 35 Iowa, 174; 14 Am. R. 494.

Vacancy.

- Bennett v. Agricultural Ins. Co. 50 Conn. 420.
Sonneborn v. Ins. Co. 44 N. J. 220; 43 Am. R. 365.
Dennison v. Phenix Ins. Co. 61 Iowa, 457.
Eddy v. Hawkeye Ins. Co. 70 Iowa, 472; 59 Am. R. 444.

Other insurance.

- Zwick v. Phenix Ins. Co. 60 Iowa, 266.
Clark v. New Eng. Mut. F. Ins. Co. 6 Cush. 342; 53 Am. D. 44.
Jackson v. Mass. Mut. F. Ins. Co. 23 Pick. 418; 34 Am. D. 69.
Funk v. Minn. etc. Ins. Ass'n, 29 Minn. 347; 43 Am. R. 216.
Somerfield v. State Ins. Co. 8 Lea, 547; 41 Am. R. 662.

Philbrook v. New Eng. Mut. F. Ins. Co. 37 Maine, 137.
 Thomas v. Builders Mut. F. Ins. Co. 119 Mass. 121; 20 Am. R. 317.
 Fireman's Ins. Co. v. Holt, 35 Ohio St. 189.
 Landers v. Watertown F. Ins. Co. 86 N. Y. 414; 40 Am. R. 554.
 Phenix Ins. Co. v. Lamar, 106 Ind. 513; 55 Am. R. 764.
 Stevenson v. Phoenix Ins. Co. 83 Ky. 7; 4 Am. St. R. 120.

Alienation; incumbrance.

Dolliver v. St. Joseph F. and M. Ins. Co. 128 Mass. 315; 35 Am. R. 378.
 Waller v. Northern Assur. Co. 64 Iowa, 101.
 Ins. Co. v. Haven, 95 U. S. 242.
 Smith v. Col'a Ins. Co. 17 Penn. St. 253; 55 Am. D. 546.
 Garver v. Hawkeye Ins. Co. 69 Iowa, 202.
 Hammel v. Queen's Ins. Co. 54 Wis. 72; 41 Am. R. 1.
 Perry v. Lorillard Ins. Co. 61 N. Y. 214; 19 Am. R. 272.
 Powers v. Guardian Ins. Co. 136 Mass. 108; 49 Am. R. 20.
 Hathaway v. State Ins. Co. 64 Iowa, 229; 52 Am. R. 438.
 Blackwell v. Miami Valley Ins. Co. (Ohio) 29 N. E. R. 278.
 Malley v. Atlantic Ins. Co. 51 Conn. 222.
 Burbank v. Rockingham M. F. Ins. Co. 24 N. H. 550; 57 Am. D. 300.
 Sherwood v. Ag'l Ins. Co. 73 N. Y. 447; 29 Am. R. 188.

Waiver of conditions.

Frost v. Saratoga Mut. Ins. Co. 5 Denio, 154; 49 Am. D. 234.
 Haight v. Cont'l Ins. Co. 92 N. Y. 51.
 Viele v. Germania F. Ins. Co. 26 Iowa, 9; 96 Am. D. 83.
 Lewis v. Council Bluffs Ins. Co. 63 Iowa, 193.

4. ASSIGNMENT OF POLICY.

McDonald v. Black, 20 Ohio, 185; 55 Am. D. 448.
 Phillips v. Merrimack Mut. F. Ins. Co. 10 Cush. 350.
 Simeral v. Dubuque Mut. F. Ins. Co. 18 Iowa, 319.
 Mershon v. Nat. Ins. Co. 34 Iowa, 87.

5. THE PREMIUM.

Effect of non-payment.

Bodine v. Exch. F. Ins. Co. 51 N. Y. 117; 10 Am. R. 566.
 Wall v. Home Ins. Co. 36 N. Y. 157.
 Am. Ins. Co. v. Stoy, 41 Mich. 385.
 Garlick v. Miss. Val. Ins. Co. 44 Iowa, 553.
 Watrous v. Miss. Val. Ins. Co. 35 Iowa, 582.
 Boyd v. Cedar Rapids Ins. Co. 70 Iowa, 325.
 Phenix Ins. Co. v. Tomlinson, 125 Ind. 84; 21 Am. St. R. 203.

Recovery of unearned premiums.

Ins. Co. v. Pyle, 44 Ohio St. 19; 58 Am. R. 781.
 Waller v. Northern Assur. Co. 64 Iowa, 101.
 Colby v. Cedar Rapids Ins. Co. 66 Iowa, 577.
 Jones v. Ins. Co. 90 Tenn. 684; 25 Am. St. R. 706.

6. AGENTS.

Powers; general and special.

- Ins. Co. v. Wilkinson, 13 Wall. 222.
 Pechner v. Phenix Ins. Co. 65 N. Y. 207.
 Waynesboro F. Ins. Co. v. Conover, 98 Penn. St. 384; 42 Am. R. 618.
 Franklin F. Ins. Co. v. Chicago Ice Co. 36 Md. 102; 11 Am. R. 469.
 Young v. Hartford F. Ins. Co. 45 Iowa, 377; 39 Am. R. 584.

Deemed agents of insurer.

- Deitz v. Prov. Wash. Ins. Co. 31 W. Va. 851; 8 S. E. R. 616. S. C.
 33 W. Va. 526; 25 Am. St. R. 908.
 St. Paul F. and M. Ins. Co. v. Shaver, 76 Iowa, 282.
 Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304.

7. THE LOSS.

What constitutes a loss.

- Blake v. Exch. Mut. Ins. Co. 12 Gray, 265.
 Burgess v. Alliance Ins. Co. 10 Allen, 221.
 Am. Towing Co. v. German F. Ins. Co. 76 Md. 25; 21 Atl. R. 553.
 Austin v. Drew, 6 Taunt. 436.
 Scripture v. Lowell Mut. F. Ins. Co. 10 Cush. 356; 57 Am. D. 111.
 Sohler v. Norwich F. Ins. Co. 11 Allen, 336.
 White v. Rep. F. Ins. Co. 57 Maine, 91; 2 Am. R. 22.
 Stanley v. Western Ins. Co. L. R. 3 Ex. 71.
 Ind. Mut. Ins. Co. v. Agnew, 34 Penn. St. 96.
 City F. Ins. Co. v. Corlies, 21 Wend. 367; 34 Am. D. 258.
 Lewis v. Springfield F. and M. Ins. Co. 10 Gray, 159.
 Babcock v. Montgomery Co. Mut. Ins. Co. 4 N. Y. 326.
 Waters v. Merchants Ins. Co. 11 Pet. 213.
 Everett v. London Assur. Co. 19 C. B. 126.
 Ins. Co. v. Tweed, 7 Wall. 44.
 Dows v. Faneuil Hall Ins. Co. 127 Mass. 346; 34 Am. R. 384.
 Cumberland etc. Ins. Co. v. Douglass, 58 Penn. St. 419; 98 Am. D. 298.
 Gates v. Madison etc. Ins. Co. 5 N. Y. 469; 55 Am. D. 360.
 Orient Ins. Co. v. Adams, 123 U. S. 67.
 Citizens Ins. Co. v. Marsh, 41 Penn. St. 386.

Valuation; measure of recovery.

- Fuller v. Boston Mut. F. Ins. Co. 4 Met. 206.
 Brinley v. Nat. Ins. Co. 11 Met. 195.
 Washington Mills Emery Mfg. Co. v. Ins. Co. 135 Mass. 503.
 Martin v. Capital Ins. Co. (Iowa) 52 N. W. R. 534.
 King v. State Mut. Ins. Co. 7 Cush. 1; 54 Am. D. 683.
 Haley v. Mfrs. Ins. Co. 120 Mass. 292.
 Ins. Co. v. Updegraff, 21 Penn. St. 513.
 Ins. Co. v. Stinson, 103 U. S. 25.

Proofs.

- Wheeler v. Conn. L. Ins. Co. 82 N. Y. 543; 37 Am. R. 594.
- Eggleston v. Council Bluffs Ins. Co. 65 Iowa, 308.
- Keenan v. Mo. Ins. Co. 12 Iowa, 138.
- Com. U. Assur. Co. v. Hocking, 115 Penn. St. 407; 2 Am. St. R. 562.

When action accrues; limitation.

- Steen v. Niagara F. Ins. Co. 89 N. Y. 315; 42 Am. R. 297.
- Ellis v. Council Bluffs Ins. Co. 64 Iowa, 507.
- Chambers v. Atlas Ins. Co. 51 Conn. 17; 50 Am. R. 1.
- Tasker v. Kenton Ins. Co. 58 N. H. 469.
- Quinn v. Capital Ins. Co. 71 Iowa, 615.
- California Ins. Co. v. Gracey, 15 Colo. 70; 22 Am. St. R. 376.
- Allemania F. Ins. Co. v. Peck. 133 Ill. 220; 23 Am. St. R. 610.

8. SUBROGATION.

In case of mortgage or other liens.

- Concord Ins. Co. v. Woodbury, 45 Maine, 447.
- Stinchfield v. Milliken, 71 Maine, 567.
- Ulster Savings Inst. v. Leake, 73 N. Y. 161; 29 Am. R. 115.
- Graves v. Hampden F. Ins. Co. 10 Allen, 281.
- Gilbert v. Port, 28 Ohio St. 276.
- Pendleton v. Elliott, 67 Mich. 496.
- Kernochan v. New York Bowery Ins. Co. 17 N. Y. 428.
- Phenix Ins. Co. v. First Nat. Bk. 85 Va. 765; 17 Am. St. R. 101.
- Wheeler v. Ins. Co. 101 U. S. 439.
- Foster v. Van Reed, 70 N. Y. 19; 26 Am. R. 544.
- Hartford F. Ins. Co. v. Olcott, 97 Ill. 439.
- Honore v. Lamar F. Ins. Co. 51 Ill. 409.
- Sussex etc. Ins. Co. v. Woodruff, 26 N. J. 541.
- Suffolk Ins. Co. v. Boyden, 9 Allen, 123.

Against wrongdoer,

- Mason v. Sainsbury, 3 Doug. 61 (26 E. C. L. 51.)
- London Assur. Co. v. Sainsbury, 3 Doug. 245 (26 E. C. L. 167.)
- Hall v. Railroad Co. 13 Wall. 367.
- Hart v. Western R. Co. 13 Met. 99; 46 Am. R. 719.
- Home Ins. Co. v. Oregon etc. R. Co. 20 Oreg. 569; 23 Am. St. R. 151.
- Mobile etc. R. Co. v. Jurey, 111 U. S. 584.
- Peoria M. and F. Ins. Co. v. Frost, 37 Ill. 333.
- Globe Ins. Co. v. Sherlock, 25 Ohio St. 50, 68.
- Conn. Ins. Co. v. Erie R. Co. 73 N. Y. 399; 29 Am. R. 171.
- Trask v. Hartford & N. H. R. Co. 2 Allen, 331.
- Mercantile Ins. Co. v. Calebs, 20 N. Y. 173.
- Phoenix Ins. Co. v. Erie etc. Transp. Co. 117 U. S. 312; 118 U. S. 210.
- Jackson Co. v. Boylston Ins. Co. 139 Mass. 508; 52 Am. R. 728.
- Newcomb v. Cinn. Ins. Co. 22 Ohio St. 382; 10 Am. R. 746.
- Clark v. Blything, 2 Barn. & Cress. 254 (9 E. C. L. 118).
- Perrott v. Sheaver, 17 Mich. 48.

9. CONTRIBUTION.

Lucas v. Jefferson Ins. Co. 6 Cow. 635.

Fitzsimmons v. City F. Ins. Co. 18 Wis. 234; 86 Am. D. 761.

Ogden v. East River Ins. Co. 50 N. Y. 388; 10 Am. R. 492.

Hurd v. Williamsburg Ins. Co. 57 N. Y. 41.

Sherman v. Madison Ins. Co. 39 Wis. 104.

Com Mut. Ins. Co. v. Detroit F. and M. Ins. Co. 38 Ohio St. 11.

Lowell Mfg. Co. v. Safeguard F. Ins. Co. 88 N. Y. 591.

[Cases on Life and Accident Insurance will be given in the next number].

Emlin McClain.

MISCELLANY.

Meteorites.

The Supreme Court of Iowa has had the privilege of passing upon a question which, it seems, has never before been presented to a court of last resort in America or England. In an action of replevin brought by the owner of land in Winnebago County, Iowa, to recover from defendant, the State Geologist of Minnesota, the possession of an aerolite, which fell upon plaintiff's land and was taken therefrom by the finder who sold it to the defendant, the lower court rendered judgment for plaintiff. On appeal the Supreme Court affirms the judgment.¹ In answer to the claim of appellant that Blackstone's rule relating to title by occupancy to moveables otherwise unclaimed found upon the surface of the earth was applicable, Judge Granger, speaking for the court, says: "If these exchanges [by meteorites falling from other planets] have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of especial value to the scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unknown things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as

¹ *Goddard v. Winchell* (October term, 1892,) 52 N. W. R. 1194.

this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our prairies by glacier action; and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are 'telltale messengers' from far-off lands, and have value for historic and scientific investigation."

Recent Books.

1. **SELECT CASES ON EVIDENCE AT THE COMMON LAW.** With notes. By JAMES BRADLEY THAYER, LL. D., Professor of Law at Harvard University. Cambridge: Charles W. Sever, 1892. 8vo. pp. xvii and 1329.

2. **PRINCIPLES OF THE LAW OF WILLS WITH SELECT CASES.** By STEWART CHAPLIN, Professor of Law in the Metropolis Law School, New York, etc. New York: Baker, Voorhis & Company, 1892. 8vo. pp. xxiv and 505.

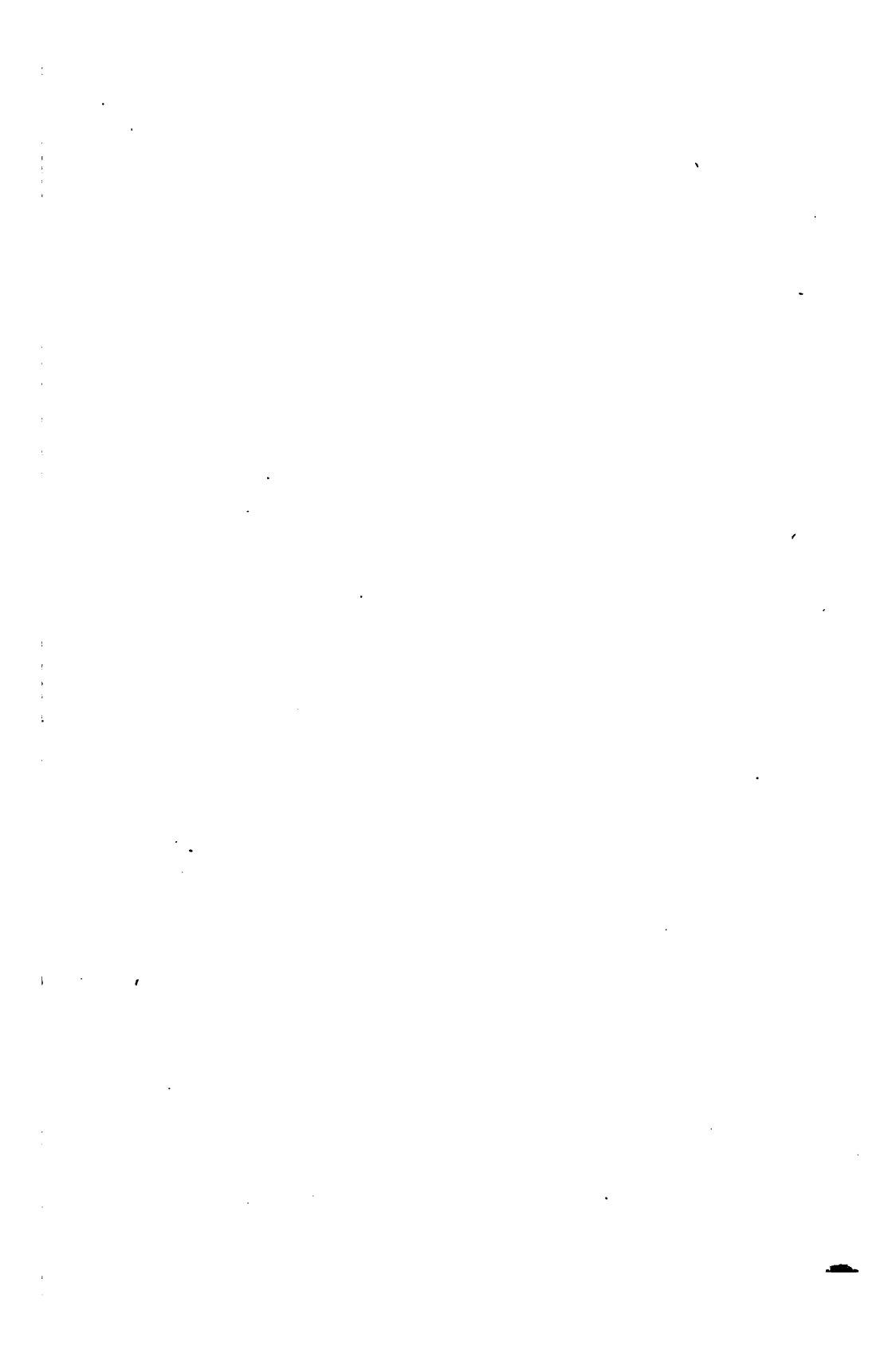
3. **LEADING CASES UPON THE LAW OF WILLS.** Selected by ALFRED G. REEVES, LL. B., Professor of Law in the New York Law School. Editor in Chief, George Chase, LL. B., Dean of the New York Law School. St. Paul, Minn.: West Publishing Company, 1892. Royal 8vo. pp. x and 77.

The point common to these three books, and which justifies noticing them together is that each is intended to afford to law students a means of acquiring knowledge of the law by the study of cases. All law teachers recognize a law library as a necessary adjunct to the law school and no matter what the method of instruction pursued, refer the student to the decisions of the courts. To furnish all students the opportunity to read cases and to save the library the wear and tear of constant use of particular volumes are good reasons for printing selected cases. These seem to be the reasons for inaugurating the publication of the series of selected cases on various subjects, of which Professor Chase is editor in chief, one of which is named above. In it the cases are printed in full, with head notes, just as they are found in the reports, the large pages, with small type in double columns, making it possible to give a considerable number of cases in a thin book.

The volume of Professor Thayer is intended, not merely to present cases to which the student may be referred, but to

furnish the basis for the entire instruction on the subject to which it relates. To this end it is necessary that the cases be very many, and that they be selected and arranged with great skill. It is needless to say that in these respects the work of so careful, learned and thorough a teacher as Professor Thayer, leaves nothing to be desired. In order that the student shall be taught to rely upon his own investigations, the cases are not furnished with head notes, or other definite indications of what is decided therein and superficial work is thus rendered impossible. The cases are occasionally supplemented by short but very valuable notes.

The effort to put the necessary cases in a reasonable number of pages has necessitated, in Professor Thayer's book, the abridgement of some, not in accordance with the theory of the case system, which requires as a part of the student's discipline, that he shall go through practically the same process in extracting the law from the case as that necessary to a lawyer or judge. But for the beginner, at least, some assistance by way of judicious culling out of immaterial matters may be justified, and in this view the method of Professor Chaplin in his work on Wills seems commendable. His cases are selected as illustrations accompanying a text, and are briefly stated in his own language, or in selected portions of the judge's opinion, so as to show clearly the very point for which the case is introduced. The result of this plan, well executed, is a very satisfactory text-book on the subject, one far superior, for students' use, to those prepared on the ordinary plan adopted in legal treatises.



THE LAW BULLETIN
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THE STATUTE OF FRAUDS — A SYNOPSIS.

In order that a clear and orderly conception of the doctrine of the Statute of Frauds may be had, the subject will be considered, *First* as to the subject matter under the English Statute and under the statutes of some of the States; and *Second* as to rules common to the different classes of contracts affected by the Statute.

No attempt will be made to enter into minute detail, nor to harmonize conflicting decisions upon the questions involved, a general outline of the subject only being intended.

I. REAL ESTATE—INCLUDING EVERY INTEREST
THEREIN.

The English Statute requires "some memorandum or note" of all contracts for the sale of "lands, tenements or heriditaments or any interest in or concerning them," which "memorandum or note" must be signed by the party to be charged therewith, or by his agent.

Certain leases were excepted from the operation of the Statute by the first three sections thereof—a consideration of which is deemed unnecessary, as such provisions have been re-enacted in few states and have received but little consideration from the American Courts.

Part Performance of the Contract

Is recognized by Courts of Equity as sufficient to avoid the statute, but only in cases in which great hardship would result by a failure to enforce the contract; and specific performance is decreed only in a case where "an agreement has been so far executed by one party with the tacit encouragement of the other, and relying upon his fulfillment of it, that for the latter to repudiate it and shelter himself under the provisions of the Statute, would amount to a fraud upon the former, that fraud will be defeated by compelling him to carry out the agreement."¹

Part execution has no effect at law,² and an action could not be maintained at law for the purchase money, even though the purchaser was in possession provided he chose to rely upon the Statute;³ although of course for any benefits derived from possession vendee would be liable.

Code of Iowa, Sec. 4915.

Contracts for the creation or transfer of any interest in lands are within the Statute, except

(a.) Leases for a term not exceeding one year.

(b.) Where (Sec. 4916.) the purchase money or any part thereof, has been received by the vendor, or, where the vendee with the consent of the vendor has *taken and held* possession thereof, *under and by virtue of the contract*, or

(c.) Where there are any other circumstances which by the law heretofore in force would have taken a case out of the Statute.

The contract having been partly performed in the manner

¹ Brown on Frauds, Sec. 443.

² Brown on Frauds, Sec. 451.

³ Wheeler vs. Frankenthal, 78 Ill. 124; and see Brown on Frauds, *supra*.

required by the Code of Iowa, becomes binding upon both parties and it can be enforced in law or equity.¹

Part performance of a lease for a term of more than one year, will not take such contract out of the Statute.²

"Purchase money" means consideration, and when part of the *consideration* is paid, whether it be in labor or in property, it is sufficient to make the contract valid.³

Illinois.

Contracts for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, are within the statute.⁴

The rules announced by the courts under the English Statute of Frauds in relation to part performance is followed by the courts of Illinois as to contracts for sale of real estate which are within the statute.⁵

Missouri.

The Statute of Frauds and Perjuries enacted in Missouri is practically a re-enactment of the English Statute, except that leases for a term not to exceed one year are excepted from the operation of the statute.⁶

Nebraska.

The Statute of Nebraska provides that every lease for a longer period than one year, or the sale of any lands or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, be in writing and signed by the party by whom the leases or sale is to be made.

It is further provided that nothing in the statute shall be construed to abridge the powers of the Court of Chancery to compel specific performance of agreements in cases of part performance.⁷

¹ Sweeney vs. O'Hara, 43 Iowa, 34.

² Hunt vs. Coe, 15 Iowa, 90; Thorp vs. Bradley, 75 Iowa, 50.

³ Devin vs. Huner, 29 Iowa, 297; Stem vs. Nysonger, 69 Iowa, 512.

⁴ Starr & Curtis, Annotated Statute of Illinois, Chap. 59, Par. 2.

⁵ Thornton vs. Henry's Heirs, 3 Ill. 218; Smith vs. West, 103 Ill. 232; Worden vs. Sharp, 56 Ill. 104.

⁶ Revised Statutes of Missouri, Sec. 2509-2512.

⁷ Compiled statutes of Nebraska, 1880, Chap. 32, Sec. 2-6.

II. PERSONAL PROPERTY — GOODS, WARES AND MERCHANDISE.

Section seventeen of the English Statute requires a note or memorandum "signed by the *parties* to be charged," or their agents in all sales of *goods, wares and merchandise*, the purchase price of which is £10 sterling or upwards, and it is declared that none other "shall be allowed to be *good*," except

(a) The buyer shall accept part of the goods and actually receive the same, or (b) give something in earnest or to bind the bargain.

Code of Iowa, Sec. 4915,

Sales of *personal property* are within the Statute, except

(a) Some part of the property is delivered, or

(b) Some part of the price paid, or

(c) When (Sec. 4916) the article sold is not at the time of the contract owned by the vendor and ready for delivery; but labor, skill or money are necessarily to be expended in producing or procuring the same.

Illinois.

No Statute regarding contracts or sales of personal property has been enacted in Illinois, and the English Statute upon that subject has never been recognized as in force in that State.¹

Missouri.

Contracts for the sale of goods, wares and merchandise for the price of thirty dollars or upwards, are within the statute, and unless signed by the parties to be charged, it is provided that they shall not "be allowed to be *good*," except

(a) The buyer shall accept part of the goods so sold and actually receive the same, or

(b) Give something in earnest to bind the bargain or in part payment.²

Nebraska.

Every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, shall be void unless

¹ *Rhea vs. Riner*, 21 Ill. 596.

² Revised Statutes of Missouri, Sec. 2514.

(a) A note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby, or

(b) Unless the buyer shall receive and accept part of such goods, or the evidences or some of them, of things in action, or

(c) Unless the buyer shall at the time, pay some part of the purchase money.¹

It will be observed that the English Statute refers to *Goods, Wares and Merchandise*.

The Code of Iowa, *Personal Property*.

The Statute of Missouri, *Goods, Wares and Merchandise*.

The Statute of Nebraska, *Goods, Chattels, or things in action*.

It has been held that goods, wares and merchandise, does not include stocks,² and it is well settled that it does not cover contracts for labor or materials.³

But with a few exceptions, and for all practical purposes, the statutes may be considered as the same in this regard.

Price.

Goods sold for less than ten pounds sterling under the English Statute, thirty dollars under the Statute of Missouri, fifty dollars under the laws of Nebraska, are not within the statute, while under the Code of Iowa, the price or value is not material; it includes *all* sales.

Delivery.

Under the English Statute, and those of Missouri and Nebraska, the vendee must "accept and receive" part of the goods, while the Code of Iowa provides that the same must be "delivered" in order to avoid the effect of the Statute.

"Accept and receive" means more than "deliver,"—the first contemplates action upon the part of the buyer, the latter upon the part of the seller.

There may be a complete common law delivery without a receipt or acceptance within the meaning of the Statute of Frauds.

¹ Compiled Statutes of Nebraska, Chap. 22, Sec. 9.

² Bishop on Contracts, Sec. 1815.

³ Bishop on Contracts, Sec. 1816.

Acceptance contemplates a mental consent to such acceptance evidenced by outward act.¹ The question is fully considered and explained by Love, J., in *Bullock & Co. vs. Tshergi & Schwinde*,² wherein it is held that delivery to a carrier in the ordinary course of transportation is sufficient to take the contract out of the Statute of the Iowa Code; while under the statutes which require "acceptance and receipt," such delivery would not be sufficient.

"Earnest" or Part Payment.

The subject of "Earnest" has received but little consideration from the American courts. It was a common law mode of binding a bargain, taken from the civil law, to show that the parties were "*in earnest*." It is not sufficient that money be deposited with a third person as a "forfeiture."³

Part payment of the purchase price is recognized by all of the statutes as being sufficient to avoid the effect of the statute. Something of value must be really given and received towards payment.⁴

Tender of part payment unaccepted, is insufficient;⁵ but part payment may be made by anything of value given and received as such.⁶

Agreement that a debt due from the vendee to the vendor shall be cancelled as part payment, is good, if the debt is in fact actually cancelled.⁷

But if the claim is not actually cancelled, or the amount of the purchase money credited thereon, it is insufficient notwithstanding the agreement.⁸

Promise by the buyer to pay some part of the purchase money to a third person, a creditor of the seller, is not suf-

¹ *Caulkins vs. Hellman*, 47 N. Y., 449.

² 18 Fed. Rep. 245; see also *Bullock vs. Stoherge*, 4 McCrary, 184; *Marsh vs. Bird*, 31 Iowa, 599; *Brown vs. Wade*, 42 Iowa, 647; *Maxwell vs. Brown*, 39 Mo. 98; *Grimes vs. Van-Vechton*, 30 Mich. 410; *Atherton vs. Newhall*, 128 Mass. 141.

³ *Howe vs. Hayward*, 108 Mass. 54; *Noakes vs. Morey*, 30 Ind. 103.

⁴ *Artcher vs. Zeh*, 5 Hill. 305; *Krohn vs. Bantz*, 68 Ind. 277.

⁵ *Edgerton vs. Hodge*, 41 Vt. 678; *Hicks vs. Cleveland*, 48 N. Y. 84.

⁶ *Dow vs. Worthen*, 37 Vt. 108; *Hunter vs. Westsell*, 17 Hun. 185.

⁷ *Peake vs. Conlan*, 43 Iowa, 297.

⁸ *Brabin vs. Hyde*, 32 N. Y. 519; *Walrath vs. Richie*, 5 Lana, 363.

ficient unless such payment is actually made, or unless the creditor accepts the promise of the buyer to pay him, and thereupon actually discharges the vendor from his liability.¹

Time of payment is unimportant if made before action is brought,² and without doubt would be held to be good if made after the action was commenced and before trial, although the point does not seem to have been directly ruled upon.

Promises of Executors and Administrators

To personally pay any debt of or charge upon the estate; *Agreements of Sureties and Guarantors* to pay the debt of another person; *Agreements upon Consideration of Marriage*, and *Agreements not to be performed within one year from the making thereof*, are all within the statute, and unless evidenced by writing are not binding.³

The Statutes of the various States are almost identical with the English Statute with reference to these four classes of contracts.

Promises of Executors and Administrators.

This provision of the statute simply means that a person who is acting as executor or administrator shall not be personally bound by an oral promise to pay a debt of the estate, and even if such oral promise is made the creditor will have to look to the estate for his claim, and not to the executor or administrator personally. The executor or administrator may become personally liable upon an oral promise to pay a debt against the estate, if upon sufficient consideration he assume such indebtedness, and the creditor releases the estate therefrom.⁴

But it will be seen that this is no exception, as the transaction is the release of the old debt against the estate, and the creation of a new contract, by the terms of which the executor becomes personally liable.

¹ *Cotterill vs. Stevens*, 10 Wis. 442; *Paine vs. Fulton*, 24 Wis. 88.

² *Thompson vs. Alger*, 12 Met. 426; *Davis vs. Moore*, 13 Me. 424; *Gault vs. Brown*, 48 N. H. 189.

³ Statute, 29 Car. II Chap. 3, Sec. 4; Code of Iowa, Sec. 4915; *Starr & Curtis' Annotated Statutes of Ill.* Chap. 59, Par. 1; *Revised Statutes of Missouri*, Sec. 2513; *Compiled Statutes of Nebraska*, Chap. 22, Sec. 8.

⁴ *Crawford vs. King*, 54 Ind. 6.

Sureties and Guarantors.

A person cannot be holden upon an oral promise to secure the debt or undertaking of another, but where the principal debtor is discharged, and the promisor personally assumes the debt, in which case it becomes a personal indebtedness of the promisor, then he may become personally liable upon his oral contract when upon sufficient consideration.¹

The test in all cases involving the liability of the promisor being whether his liability is that of a surety for the principal debtor, or whether he assumes the position of principal debtor himself. A promise by A. to B. that if B. will act as surety for C., A will pay to him any amount which he is compelled to pay as such surety, is not within the statute, as it is a private contract between A. and B., and A. is not paying any other person's debt but it is a payment of his own.²

Agreements on Consideration of Marriage.

This clause of the statute relates to contracts based upon marriage as a consideration. It does not include a mere promise to marry.³

Agreements not to be Performed Within One Year.

Contracts affected by this clause of the statute are those only by the terms of which the complete execution within a year from the time of the making is impossible. When it is *possible*, no matter how *improbable* it may be that the contract will be completed within the year, oral words will be sufficient. Agreement to be performed on the death of a person, agreement to furnish support during life, or an agreement, the execution of which depends upon any other contingency, which may or may not happen within a year, is not within the statute.⁴

Agreement to marry within three years need not be in writing, but a promise to marry three years from the date of the promise is within the statute.⁵

¹ Aldrich vs. Jewell, 12 Vt. 195; Townsley vs. Sumrall, 2 Pet. 170-181; Wakefield vs. Greenwood, 29 Cal. 597; Richardson vs. Williams, 49 Maine, 588.

² Eastwood vs. Kenyon, 11 A. & E. 438; Hawes vs. Woolcock, 26 Wis. 639; Maxwell vs. Haynes, 41 Maine, 559; Center vs. McQuesten, 18 Kan. 476.

³ Blackburn vs. Mann, 85 Ill. 222; Clark vs. Pendleton, 20 Conn. 425.

⁴ Hutchinson vs. Hutchinson, 46 Maine, 154; McCormick vs. Drummatt, 9 Neb. 324; Frost vs. Tar, 53 Ind. 390; Cole vs. Singerly, 60 Md. 348; Jones vs. Pouch, 41 Ohio State, 146.

⁵ Nichols vs. Weaver, 7 Kan. 373; Derby vs. Phelps, 2 N. H. 515.

III. MEMORANDUM OR NOTE IN WRITING.

Common to all the Statutes of Frauds is the requirement that some note or memorandum in writing be signed by the party to be charged thereby, or by his agent duly authorized. It will be noticed that the English Statute and that of Missouri relating to sales of personal property provides that the note or memorandum must be signed by the *parties* to the agreement; but it is well settled that even under those clauses the only signature required is that of the party against whom the contract is sought to be enforced. Therefore the note or memorandum in writing must be signed by the *party* to be charged. It may be signed by the party himself, or by his authorized agent, and generally the authority to the agent may be shown by oral testimony, although under the Statute of Illinois authority to sign a memorandum of sale of real estate must be in writing. This, however is an exception to the general rule.

The agent may sign in his own name.¹

The memorandum must be sufficient to in itself show the nature of the contract,² the subject matter,³ and the contracting parties.⁴ As to whether the price must appear the authorities are in conflict, but the greater weight of authority is to the effect that if the price has been agreed upon it must appear.⁵

Any other terms agreed upon, if the contract is conditioned thereon, must appear in the memorandum, such as if credit is given;⁶ time and place of delivery, if agreed upon;⁷ "subject to buyer's approval."⁸ There are cases, however, which hold that such conditions may be shown by parol.

¹ *Burke vs. Haley*, 7 Ill. 614; *Doly vs. Wilder*, 15 Ill. 407; *Gowen vs. Klous*, 101 Mass. 449; *Weiner vs. Whipple*, 53 Wis. 302.

² *Watt vs. Wisconsin Cranberry Co.* 63 Iowa, 730; *Vaughn vs. Smith*, 58 Iowa, 538; *Stone vs. Browning*, 68 N. Y. 596.

³ *May vs. Ward*, 134 Mass. 127; *McElroy vs. Buck*, 35 Mich. 484; *Pulse vs. Miller*, 51 Ind. 190.

⁴ *Grafton vs. Cummings*, 99 U. S. 100; *Bailey vs. Ogdens*, 3 Johns. 419.

⁵ *Ide vs. Stanton*, 15 Vt. 636; *Phelps vs. Stillings*, 60 N. H. 505; *Ashcroft vs. Butterworth*, 136 Mass., 511.

⁶ *Wright vs. Weeks*, 35 N. Y. 153; *Norris vs. Blair*, 39 Ind. 90; *Williams vs. Robinson*, 73 Maine, 193.

⁷ *Smith vs. Shell*, 83 Mo. 315.

⁸ *Boardman vs. Spooner*, 13 Allen, 353.

Generally it may be said that the whole contract must be ascertainable from the memorandum, and that verbal testimony is not admissible to supply omissions, but the very nature of bargains and sales of personal property, consisting of the various articles which are the subject of barter and sale in the markets, must necessarily involve the introduction of parol testimony to explain the numbers, abbreviations, initials and cabalistic figures which appear upon memoranda of sales, many of which are local in their character, or peculiar to a certain line of business.

For explanation, and to aid the interpretation, parol testimony is always admissible, but to supply defects or omissions in the memoranda, according to the weight of authority, such testimony cannot be used.

The Effect of the Statute.

The statute does not render the contract absolutely void, but according to the English Statute "no action shall be brought" thereon, and according to the Iowa Code, "no evidence of the contract is competent." The effect of both statutes is practically the same, and the rules applicable to the one are applicable to the other,¹ except that *Code of Iowa, Sec. 4917*, provides that the statute does not apply in case the contract is not denied in the pleadings; and *Sec. 4918* provides that the party to be charged may be used as a witness to establish the contract.

The statutes of the various states are in the main a re-enactment of the English Statute, except such slight modifications as are indicated herein. The lawyer should carefully study the statutes of his own state, and the decisions thereunder, and always in case of doubt turn to the reason for the enactment of the statute, viz., to prevent frauds and perjuries in establishing contracts by oral testimony. Where under one construction of the statute the evil will be permitted, and under another it will be prevented, the latter construction will be adopted.

Martin F. Wade.

¹ *Westhelmer vs. Peacock*, 2 Iowa, 538.

HYPOTHETICAL CASES ON CONTRACTS.*

[The student is expected to fully investigate the questions involved in the following cases. It is not sufficient that he be able to state the rule in a given case; he must go further. He must so familiarize himself with the principles involved as to be able to intelligently discuss the same and show their application not only to the particular facts involved, but to analogous cases.]

This result can only be attained by a careful study of the adjudicated cases involving like or similar questions. No cases are cited, as it is the purpose of these hypothetical cases, not only to enable the student to acquire a knowledge of the principles involved, but also that he may have practice in searching for and finding pertinent cases and preparing briefs.

Unless otherwise indicated in the question it is desired that the student be able to state whether or not the facts in the particular case are sufficient to show a cause of action, or whether by reason of any facts stated in the question, the party to be charged in an action upon the contract has a good defense.]

1. A sells to B his interest in 160 acres of land by quit claim deed; he afterwards buys the same from C, who holds under adverse possession for ten years. Can he recover possession as against his grantee?

(a) He afterwards issues execution upon a judgment against X, who has an interest in the property—can he sell the property thereunder?

2. A, the owner of a farm and residing thereon, is asked by B, a stranger traveling on the road, who owns the farm on which he lives; A states that C is the owner; B goes to C and buys the farm and pays for it—can he recover the property from A?

(a) B is a land buyer and such fact is known to A, can he recover?

(b) B has been looking at the farm for some time with a view of purchasing, which is known to A, can he recover?

3. A and B, adjoining land owners in Johnson County, Iowa, mistakenly agree to a certain division line; improvements are made by A extending up to the line agreed upon;

* These Cases are supplemental to the valuable list prepared by Professor Wambaugh and appearing in Numbers One and Two of the *LAW BULLETIN* of 1891.

five years thereafter it is found that such line is upon the land of B, and that the true line is two rods further North—A's land being North of B's, can B recover the land up to the true line ?

(a) No improvements are made by A, but the land to the line is cultivated by him for five years, can B recover ?

(b) It is cultivated by A for ten years, can B recover ?

(c) It is not cultivated or fenced, but remains unimproved; ten years after the agreement is made B brings suit—can he recover ?

4. A owns 160 acres of land in Johnson County, Iowa, purchased by him in 1880. It being then unbroken prairie, he immediately places it under cultivation and farms all of the same to the present time. A highway was located according to law through the same in 1860; A had no knowledge thereof; can the Road Supervisor now open the highway ?

(a) The road was located along the north side thereof, four rods wide; it was traveled to the extent of about twenty feet on the North side of the four rods; the land was cultivated up to that point—can the highway be worked to its full width, A having no knowledge of the location ?

(b) A has knowledge that the road was located, but is told by a competent lawyer that the location was void. A cultivates the whole of the portion laid out as a road from the time of the purchase up to the present time; can the road be opened ?

5. A horse is allowed to stand without being hitched upon a crowded street; it runs away and injures B; inquiry is made by B as to who owns the horse; A states that he is the owner, B then sues A for damages; can A deny ownership of the horse, and allege that he was mistaken when he made the statement ?

(a) A knows that the horse is not his, but willfully makes the false statement; is he estopped ?

6. A lives on lot 4; he also owns lot 5 which lies adjacent to lot 4 on the north; B a stranger in the city, buys lot 3; he

goes to A and asks him to locate lot 3. A, supposing that lot 5 lies south of lot 4, although he has lived upon lot 4 for ten years, points out to B lot 5 as his property. Relying thereon, B erects a dwelling on lot 5; the error is not discovered until the building is completed. What are the rights of the parties?

(a) Before the mistake is discovered A sells lot 5 to C, who has no knowledge of its location—what are C's rights?

(b) At the time of the transaction there is a judgment against A, which by law is made a lien upon lot 5; can the holder of the judgment enforce it against lot 5?

(c) Two years before the transaction A executed a mortgage to X, who lives in Chicago, and who has no knowledge of the location or of the transaction; can X enforce his mortgage against lot 5?

7. A and B enter into a written contract by which A agrees to furnish to B 500 tons of hay at \$5.00 per ton; after the writing is signed they get into some controversy and B snatches the contract from the hand of A and goes away; can B enforce the contract?

(a) B assigns the contract for value to C, can it be enforced?

(b) Suppose the paper to be a negotiable note instead of a contract, what are the rights of B and C respectively?

8. A, on Jan. 1st, executes to B a deed, and places it in the custody of X, to be delivered upon the execution of a mortgage by B. The mortgage is executed on Jan. 15th, but X refuses to surrender the deed, and holds the same until Feb. 1st, when he gives it to B; when did the title to the property pass to B?

(a) A gives deed to B, the grantee, to be deposited by him in his safe until mortgage is executed; when does the title pass? Discuss.

(b) A deposits deed with C to be held by him for a year, if he (A) dies within the year, it is to be delivered to B, the

grantee, otherwise to be returned to him; A dies within a year; will delivery of the deed pass title?

(c) A does not die within the year, and demands the deed, but finds that C has delivered it to B; can A recover the property?

(d) B, after delivery as aforesaid, sells the property to X, who is an innocent purchaser for value; does X get title?

9. A makes a deed of land described as follows: "All the land I now own in Johnson County, being the northwest quarter of the northwest quarter of section 6, containing forty acres, commencing at the northwest corner of said section 6, running thence south forty rods, thence east seventy rods, to the west line of the northeast quarter of said northwest quarter of section 6, thence north along the west line of said northeast quarter of the northwest quarter of section 6, to the northwest corner thereof, thence west to the place of beginning." As a matter of fact A owned sixty acres in Johnson County; how much land is conveyed?

10. A pays B \$1,000 for his practice as a physician in the city of Chicago, and B agrees that he will never practice his profession at any time in the future in the State of Illinois; B removes to Rock Island and enters upon the practice; what rights has A against him?

(a) If A brings an action to enjoin B from violating his contract, can B plead the invalidity of the contract without tendering back to A the money received?

11. A and B enter into a contract by which they are to steal horses in Iowa and ship the same to Kansas City for sale; having jointly stolen about twenty horses, the same are shipped to Kansas City and sold. A receives all the money, and refuses to pay any portion of it to B; can B maintain an action for an accounting?

12. A pays a note to B with money which both parties suppose to be genuine, and the note is delivered to A and cancelled. The money is in fact counterfeit; can the debt be collected from A?

(a) A pays the debt by a note upon C, which is accepted by B in full payment for note. A and B suppose C to be solvent, but in fact at the time of the transaction C was insolvent and had made an assignment; can B maintain an action for the debt? *C*

(b) At the time of the payment of the debt by the note, as stated in the last case, A knew that C was insolvent, but concealed such fact, and B accepted the note in full payment, believing the maker to be solvent; can he maintain an action for the debt?

13. A is the devisee of a valuable tract of land; the will of devisor is contested by parties interested, and the will having been set aside by the lower court, by the decree of which A lost all his interest in the land, A has appealed, and the case is pending before the court of last resort; A conveys all his interest in the property to B for a nominal price. It develops that the day before the sale the court decided the case in favor of A, confirming his title to the land, a fact unknown to either party; can A recover back the land?

14. A offers B \$200 for his black horse; B having two black horses, supposes the offer to be made for one, a draft horse, and accepts it; the offer was in fact made for a driving horse.

Q (a) A makes the offer for the "black horse;" B understands him to make the offer for a different horse, which is brown, and accepts the offer. *T*

15. An attorney represents to his client that he has no equity of redemption in land sold under foreclosure, when in fact under the law he was allowed to redeem within one year, which rule of law was known to the attorney, and under the representations his client sells to the attorney his interest in the land for a nominal sum.

(a) The attorney having no knowledge of the rule of law, has the seller any remedy?

(b) Under the law the widow is entitled upon the death

of her husband to one-third in fee simple of all his real estate, the widow in fact believes herself to be entitled to only a one-third interest for life, and under such belief conveys her interest to A, who knows what the grantor's rights are under the law, and who pays her only the value of her life estate, but makes no representations.

(c) A, when he purchases, believes that the widow is only entitled to a life estate, and pays her only the reasonable value thereof.

(d) A knows that the widow is entitled to one-third in fee simple, and makes her an offer therefor, the widow supposing she has only a life estate, and that the offer is only for such interest, accepts the offer.

16. A represents to B that a note which B is asked to sign and which he can read, will become due only on the happening of a contingency, when in fact it is absolute in its terms.

(a) A represents to his son B who executes his note to him, that he intends as soon as he sells his farm to deliver up to B the note without payment, A sells his farm but does not deliver up the note.

17. A sells his farm for \$5,000.00; he states to the purchaser that he believes that there is coal beneath the surface.

(a) A states to the purchaser that he believes that the farm contains 256 acres; it in fact contains but 236 acres, of which fact A was ignorant.

(b) A states that the reasonable value of the farm is \$6,000.00; it is in fact worth only \$4,000.00, a fact well-known to A, and unknown to B.

18. A sells a carriage, knowing that the axel is cracked, which defect owing to the paint is concealed; he makes no representations.

(a) The defect is apparent to the ordinary observer, and the purchaser has opportunity for examination.

(b) The purchase is made at X, the carriage being at the time at Y, the defect is patent.

(c) Upon discovering the defect the purchaser tries to sell the article to numerous persons, failing in this he waits six months, can he then rescind?

(d) The purchaser brings an action for damages; can he afterwards rescind?

19. A is negotiating a purchase of B's horse, while examining the horse, C, a by-stander, in no way interested, represents to A that the horse is standard bred, a statement which is false and known by C to be false; A relies upon the representations of C, and buys the horse. C

(a) B hears the representations of C, knows them to be false, and knows that A is relying upon them in making the purchase.

(b) The horse is in fact standard bred and worth \$500.00; B is ignorant of such fact, C who formerly owned the horse, privately informs A of such fact, and A buys the horse for \$100.00, without imparting to B the facts learned from C.

20. A having been led to purchase property from B by false representations made by him, sells the property; after acquiring knowledge of the fraud, can A rescind?

(a) Can he maintain an action for damages.

(b) C, being present at the sale, heard the false representations made by B to A, believed them to be true, but was in no way interested; C, subsequently, relying upon the representations made by B to A, buys the property from A, can C sue B for damages?

21. A secures a deed of property from his mother who is aged although of sound mind, upon representations that her other children are seeking to secure possession of her property, the representations are false and such fact could be ascertained by reasonable inquiry on the part of the mother.

22. A is the owner of a promissory note for \$1,000.00, payable to B, and which has never been assigned to A, the

payee refuses to pay to A unless the note is properly assigned; B refuses to assign unless A gives him \$500.00, which A not knowing his legal rights, agrees to pay; is the agreement binding?

23. A, the payee of a note, alters the rate of interest from six to eight per cent.

(a) It was the agreement that the rate of interest should be eight per cent, but by mistake six per cent was written in the note; A alters it to eight per cent.

(b) The note is dated January 1st, 1891, the day it was in fact made, A changes the year to 1892.

(c) A changes the date from Jan. 1st, 1891 to Jan. 1st, 1890.

(d) It was in fact executed Jan. 1st, 1890, but by mistake dated Jan. 1st, 1891; A changes it to the proper date.

(e) A changes rate of interest from six per cent to eight per cent, and then sells it to an innocent purchaser for value before maturity, is the note valid in his hands?

(f) A, after changing the rate of six per cent to eight, restores it to its original condition, is it good in his hands?

(g) After restoring it, A sells to an innocent purchaser for value, is it valid?

(h) After altering note so as to invalidate it, can A recover upon the original consideration?

24. A, a grantee by deed, after delivery to him fraudulently alters it, does it effect the title conveyed thereby?

(a) Can the deed after alteration be used in evidence to establish the title?

(b) A deed having been duly executed and delivered to B in escrow erases the name of A grantee, and inserts the name of C, and delivers it to C, does C acquire title thereby?

(c) C having duly recorded such instrument, sells the property described therein to D, an innocent purchaser for value, does D acquire title thereby, the grantor having no knowledge of the alteration, or the delivery to C.

25. A, the payee of a promissory note, leaves it upon his desk and it is materially altered by his agent without his knowledge or consent.

(a) It is altered by a stranger without the knowledge or consent of payee.

(b) It is placed for safe keeping with C, who makes a material alteration while it is in his custody.

26. A agrees to convey to B a business block in the city or 240 acres of land in the country, for the sum of \$5,000.00, on Jan. 1st, 1892. Who has the right to elect which shall be conveyed, and up to what time does the right of election continue in such person?

(a) A agrees to convey the property above referred to, the contract providing that B may elect which he shall take. In order to maintain an action for the breach, what act is necessary upon the part of B?

(b) B having exercised the right of election, can he afterwards revoke the same without the consent of A?

27. A promise to pay \$100, with the stipulation that the debt may be discharged by the delivery of 100 bushels of wheat on or before March 1st, 1892; can the debt be discharged after that date by delivery of the wheat?

28. A, tenant of B, under a lease which provides that if the property is used for unlawful purposes, that the lease shall become invalid at the election of the lessor, uses the property for an illegal purpose, the lessor with knowledge of such use accepts an installment of rent for a period after such illegal use, can he afterwards elect to declare the contract void?

(a) If he accepts the installment of rent without knowledge of the illegal use, will he have the right to avoid the contract?

29. A buys of B, by written order, a Remington typewriter; instead of the Remington, B forwards by express a Caligraph; A accepts the same without objection; is he held by his contract?

30. A agrees to build for B, upon his farm in Wright county, a brick house containing twelve rooms; instead of building a house of that description, he builds a wooden structure containing six rooms; B, a resident of Chicago, knows nothing of the structure until it is completed; is he liable to A upon his contract?

(a) Is B liable to A for any amount, and what, if anything, may B do to protect himself against liability?

(b) B is present at the time the house is constructed and sees the nature of the structure, and allows A to proceed with the work until the building is completed without objection; is B liable either upon the contract or otherwise? ~~A~~

(c) A agrees to construct a building as first herein described, and to have the same completed by March 1, 1892; he does not complete the same until June 1, 1892; is B liable for the contract price?

(d) Will it change the liability of B that he was present and knew that the building was not completed on March 1st, and allowed A to proceed with the structure and complete it June 1st without objection?

(e) A states to B on February 1st that he will not be able to complete the building at the time designated, and A orally extends the time for the completion until June 1st without any consideration; is he liable upon the contract?

31. A agrees to convey to B his farm on January 1, 1892, provided B will deliver to him at that date, as part payment, a deed to his house and lot. Before the time for performance A sells the farm to a third person; is B bound to tender to A a deed of the house and lot before bringing action for breach of contract?

(a) The conveyance of the farm to the third person is made November 1, 1891; when may A bring an action for damages?

(b) On January 1, 1892, A, still owning the property, refuses to convey; what rights has B, and what acts must he perform in order to assert such rights? Discuss.

(c) On November 1, 1891, A states to B that he will not comply with his contract, and that he will not convey the property; what rights has B, at what time may they be asserted, and what steps, if any, must be taken by B in order to assert such rights?

32. A executes to B a deed to his farm, and the deed is properly delivered. Subsequently, by consent of parties, the deed is destroyed. Does the destruction of the deed reinvest A with title to the property?

(a) Upon the destruction of the deed A sells the property to C, an innocent purchaser, who knows nothing of the deed made from A to B; does C obtain title?

(b) In case C knows of the execution and delivery of the deed from A to B, and knows of the destruction of the deed; does that effect his rights under his purchase?

33. A employs B to work for him for three years for the sum of \$5,000, conditioned that the compensation should not be paid until the expiration of that time; B after working one year refuses to work longer; can he recover from A upon his contract.

(a) Can he recover any amount, and if so, what is the basis of his action?

(b) After B has worked one year, A discharges him and refuses to allow him longer to work, can B recover any amount from A; if so, how much?

(c) B upon being discharged is unable to procure work from any other person in the vicinity, or within a reasonable distance thereof; can he recover the full amount of his contract?

(d) B, who was employed as a book-keeper by A, cannot secure employment in that line, but can secure employment as a teamster at \$100 per month; what is the measure of his recovery against A?

34. A sells to B 160 acres of land; it is agreed that B shall pay \$100 Nov. 1, 1891; \$100 Dec. 1, 1891; \$100 Jan.

1, 1892; and A agrees to make a deed to B upon Jan. 1st if he has paid all the installments according to contract. B pays the two first installments but refuses to pay the balance, or to accept the deed. A has been at all times ready to comply with his contract; can B recover back the money paid or any part thereof?

35. A agrees to construct a creamery for B, and to put in all necessary machinery; after the building is completed B refuses without cause to allow A to proceed further with the contract; at that time the machinery has been ordered by A, and is in process of manufacture, but will not be completed for two weeks, all of which is known to A. A allows the manufacturers to complete the machinery, and ship it to X, where the building is located. The machinery is practically worthless to A; had he notified the manufacturers at the time when B refused to allow him to complete the contract, the damage would only have been \$1,000, but the machinery being completed and sent to him, his damage is \$2,000; can he recover the latter sum?

36. A forges B's name to a note and sells it to C; B is requested to pay the same, and finding it is a forgery so notifies C, who endeavors to secure the arrest of A. B, who is an uncle of A, then tells C that he will pay the note; he afterward refuses; is it a valid obligation against B? Discuss.

37. A owes B \$100; A pays him \$50 in consideration that he will execute to him a release, under seal, of the whole debt, which is done in proper form; can B recover the balance of the debt? Discuss under common law rule. H

(a) The release is as follows: "In consideration of the sum of fifty dollars, I hereby release and fully cancel the debt of \$100 due me from A. Witness my hand and seal this 1st day of January, 1891. B (seal);" can B recover the balance of the debt?

38. A, B and C are jointly liable upon a contract to D. D releases A; can he maintain action against B and C? Ch

(a) In the release of A it is stipulated that the release shall operate only as a release of A, and shall not affect the liability of B and C. Can an action be maintained against B and C?

(b) A dies; can action be maintained against his estate upon the contract?

(c) A and B die and C pays the debt; has he any remedy against the estate of A and B? State extent of liability of estates if any and form of action.

39. A agrees to pay B, C and D jointly, \$1,000.00; A pays the amount to D, who executes release, can B and C recover from A their share therein, they having no knowledge that it was paid to D, and not having authorized payment to him?

(a) State the rule under the Code of Iowa.

40. A, seventeen years age, is emancipated by his parents, he afterwards makes a contract with B; is the contract binding?

(a) He acquiesces in the contract until he reaches the age of twenty-one years, then advises B that he will not comply with the contract; is A bound?

(b) The contract was the purchase of a horse for one hundred dollars for which A gave his promissory note, payable in five years; one year thereafter, A told B that he would not abide by the contract, and that he disaffirmed the same; he had the horse in his possession but did not offer to return the same; is A bound by the note upon attaining majority?

(c) A still has the horse upon attaining majority, and under the facts stated in the last question he retained the same and took no steps in relation to the contract after attaining majority; is he liable upon the note when due?

(d) A, upon reaching the age of eighteen years, tenders the horse to B and demands back his note, which B refuses; A then retains possession of the horse and has possession of the horse when he attains his majority; nothing more is done in relation to the contract; is he liable?

41. A, a resident of Iowa, eighteen years of age, is emancipated by his parents and is engaged in business for himself; he buys property from B, who knows he is not of age, and execute his note therefor, payable in five years; is A liable upon the note?

(a) Is it material that B has no knowledge that A is not of age.

(b) The day upon which A attains his majority he still has the property purchased from B in his possession, but sells the same on that date; within a reasonable time after attaining majority, he disaffirms the note given to B, without making a tender of any money or property; can B collect the note?

(c) Before maturity of the note B sells the same to an innocent purchaser for value; A disaffirms the same within a reasonable time after attaining majority; is he liable thereon?

(d) At the time of such disaffirmation A has in his possession part of the property purchased from B; is he required to deliver the same to the buyer of the promissory note?

42. A, a minor eighteen years of age, buys necessities and executes his note therefor, due in six months; B, who sells him the goods brings an action for the reasonable value of the goods three months after the same has been purchased and makes no reference to the promissory note; can he recover?

(a) A, by his guardian in making defense, admits the purchase of the goods; admits that they were necessities, but alleges that the debt is not due for the reason that a promissory note had been given, payable in six months; the court upon this plea, abates the action; when the note becomes due can B recover thereon against the minor?

(b) Three months after the purchase of the goods A informs B that he will not be bound by the terms of the note because of his minority, thereupon B brings action against him for the reasonable value of the goods; can he recover?

43. E, a married woman, buys property and executes her personal note therefor, in an action upon the note the plea of

coverture is made; the property, however, still remains in her possession, and no tender is made by her; is she liable upon the note?

(a) The property for which the note is given is a house and lot; an action is brought upon the note; the plea of coverture is made, upon which the holder of the note dismisses the action without prejudice; one year thereafter A becomes a widow; two years after the death of her husband the holder of the note brings suit thereon; can A avoid the same still retaining possession of the property and not offering to return the same?

44. A executes his note to B for \$1,000.00, being the purchase price of a piano, at the time of the execution of the note A was insane; the note is transferred to C, an innocent purchaser, for value, before maturity; neither B nor C had any knowledge of A's condition and the contract is fair; can C enforce the note?

(a) In suit by C upon the note, the plea of insanity is made, but the property is still retained by A; is he liable?

(b) Upon the trial of the case, it develops that A has been insane for some time, but that he has lucid intervals once or twice a week, which vary in duration from one to six hours; what is the presumption as to whether the note was made during such interval?

45. A, who has been judicially declared to be of unsound mind, and who has a guardian, sells to B his farm and executes a deed therefor, B having no knowledge of the insanity or appointment of guardian; is the contract valid?

(a) In an action to recover the farm, brought by A's guardian, upon whom is the burden of proof?

(b) After the purchase of the farm B sells the same to C, who has no knowledge of the insanity or guardianship, and who pays a valuable consideration; can the property be recovered by A?

(c) In an action against B to recover the property no tender is made of the purchase price; does this affect the right of recovery?

(d) A squanders the money received from B for his farm, and in an action against B to recover is unable to tender the same; does this affect his right to recover?

46. The Board of Supervisors of Clark County enter into a contract for the erection of a court house costing \$50,000; they have no authority to make such contract without an affirmative vote of the electors of the county; they allow the contractor, however, to proceed with the building and complete the same in all respects; is the county liable?

(a) The County of Clark by its auditor, under instructions of the Board of Supervisors, issues its warrants payable to the contractor, A B, or order, due in six months from date; A B sells the same to C, an innocent purchaser, for value, before maturity; can C recover thereon?

(b) Are the supervisors personally liable under either state of facts?

47. A is the agent for B, and his duties consist of buying and selling real estate in the State of Iowa, having full power and discretion in the matter; he buys property of C without disclosing his agency; C supposing him to be the principal, the contract is duly executed and signed by A personally; can C hold A upon the contract?

JH, (a) Can C hold B upon the contract upon discovering the fact of agency?

JH, (b) Upon discovering the fact that A was only acting as agent, and that B was the actual purchaser, C refuses to carry out his contract; can the contract be enforced by B?

(c) As part of the consideration A executes his personal note for part of the purchase price; can an action be maintained against B upon the note, the deed of the property having been made to him?

(d) In making the sale to A, C, knowing nothing of the

agency, makes false representations, by which A is misled and induced to purchase the property; the deed is made by C to B, and accepted by B; can B maintain an action for damages for false representations ?

(e) The deed is made by C to A personally, who in fact is acting only as agent, and who immediately transfers the property by deed from himself to B, false representations having been made as above stated; can B maintain an action against C therefor ?

48. A number of persons form themselves into a base ball association without incorporating or signing any contract among themselves; at the first meeting A is chosen president and B secretary, and C, D and E executive committee; without any special authority, or without being directed to do so, the executive committee purchase a stock of balls, bats, and other necessities for playing; X was present at the first meeting when the officers were elected, but knew nothing about the purchase until after it was completed; is he liable for any part of the purchase price ?

(a) After the election of the officers as above indicated at the first meeting, an adjournment was had upon motion duly carried by unanimous vote, until the following Thursday, at which time a meeting was held, all members being present except X; it was unanimously voted to purchase grounds for the use of the association; X knew of the meeting but did not attend; is he liable ?

(b) At the first meeting by-laws were adopted providing that the association should be governed by a majority vote upon all questions pertaining to its interests, and the regular meeting was fixed for the fifth of each month; X was present and consented to the adoption of such by-laws; at the next regular meeting it was agreed by a majority vote that uniforms should be purchased for the team; X voted in the negative; is he liable ?

(c) At the regular meeting above referred to, it was unanimously voted by all present to purchase the uniform; X was not present; is he liable ?

49. A owns an account for goods sold and delivered to B; he sells the same to C; can C maintain action thereon in his own name ?

(a) Can A sue thereon without the consent of C ?

(b) After the sale of the account, and without knowledge of such sale, B purchases an account against A; can he plead the same as a set-off in an action by C ?

50. A sells a negotiable note after maturity; B, the payor, at the time of such sale, has an account against A for labor performed; can such account be used as a set-off in an action by the purchaser of the note ?

(a) Can B plead payment as a defense against the note in the hands of the purchaser ?

(b) State the general rule under the code of Iowa as to the assignment of choses in action and negotiable instruments, and what may be pleaded as a defense in an action thereon by the purchaser.

(c) What is the rule as to the assignability of choses in action in the following states respectively: Illinois, Missouri, Nebraska, Minnesota.

51. A, who is heavily indebted, sells his farm worth \$5,000 to B for the sum of \$3,000; B has no knowledge of the debts and buys in good faith; what rights, if any, has a creditor of A in the property ?

(a) A, under the circumstances above indicated, sells the farm to his wife, to whom he is indebted in the sum of \$3,000 for money received from her father's estate twelve years previous to that time, for which no note or obligation has been given; can the creditors of A set aside the transaction ?

(b) A is surety upon a bond of \$10,000, the bond being given by the treasurer of Linn County; he has been advised that the treasurer is a defaulter, and that he will be liable for the full amount of his bond; believing the report to be true he conveys his property without consideration to his brother; the report is in fact untrue; can he afterwards recover the property ?

(c) A, who is heavily indebted, sells his farm worth \$5,000, to his son, who pays him \$4,000 in cash, and this amount is named in the deed as consideration. In fact the son also agrees to pay his father the sum of \$100 annually during his life time; nothing is said in the deed about this condition. The farm is all the property A owns, but the son has no knowledge of the indebtedness existing against his father; can the transaction be set aside in favor of creditors?

52. A and B make a contract, by the terms of which A agrees to convey to C a tract of land; C knows nothing of the transaction until after the contract is executed, and pays no consideration; can C maintain an action against A on the contract?

(a) After the contract is fully completed, and before C has knowledge thereof, A and B mutually rescind the contract; what are C's rights, if any?

(b) The contract is completed, and C has knowledge thereof; can A and B rescind the contract?

53. A sells the farm to B upon which C has a mortgage; B, as part payment of the purchase money, assumes and agrees to pay the mortgage of C; C has no knowledge of the transaction; may he afterwards maintain an action against A on the mortgage?

(a) May C maintain an action against B on the mortgage?

(b) If C brings an action against A, and recovers upon the mortgage, what rights has A against B?

(c) B sells the land to D with covenants of warranty, subject, however, to C's mortgage; can D be held personally for the mortgage indebtedness?

(d) If C collects the mortgage from A what is the respective liability of B and D.

54. A, residing at Iowa City, Iowa, sells to B, one hundred head of hogs; no part of the money is paid; A upon the same day makes a written statement of the sale to B and signs the same and puts it in his desk at home, from which place it

is taken by his servant without any authority and delivered to B; is the contract binding on A.

(a) B brings an action on the contract, alleging that it is an oral contract and failing to allege that any part of the consideration was paid; A demurs to the petition, should the demurrer be sustained?

(b) In the action aforesaid, A files an answer alleging that he admits the execution of the contract, but alleges that the same is not enforceable because not in writing and voidable under the statute of fraud. Is the answer subject to demurrer.

(c) In the action aforesaid, A files an answer thereto a general denial; can he rely under such defense upon the statute of fraud?

(d) B expects to rely upon the testimony of A to establish the contract, is it necessary to allege such fact in the petition?

55. A sells land to B, representing that it is dry and productive; B relies upon such representations; they are in fact untrue, but A has no knowledge thereof. Discuss.

(a) A states to B that he has full knowledge of the condition of the land; that he has seen it, and that it is dry and productive; A has never seen the land and in fact knows nothing about its condition.

56. A writes to B, a merchant, stating that he is the agent of C, and stating that he desires to buy a bill of goods for C; the price is agreed upon and the goods shipped to A, who receives the same and pays for them. A in fact is not agent for C, but buys the goods for himself personally. B would not have sold the goods to A had he known he was buying the goods personally for himself, but made the sale because C was a special customer. Can B recover the goods.

(a) A upon receipt of the goods sells the same to X, an innocent purchaser for value, can B recover the goods?

57. John Adams, of Clinton, is a regular customer of Marshall, Field & Co., Chicago, and buys a large quantity of

goods; another person of the same name sends an order to Marshall, Field & Co., for a bill of goods. Marshall, Field & Co., supposing that it is the customer with which they have been dealing, fills the order, sends them C. O. D. and receives payment; can the goods be recovered?

(a) The purchaser of the goods, who is in fact a farmer by the name of John Adams, and who believes he can get his goods cheaper by ordering them direct, procures some of the stationery of John Adams, the merchant, and orders the goods thereon. Marshall, Field & Co., ship the goods, believing that it is the merchant that had ordered them and receives pay. Can the goods be recovered?

(b) The goods are sold to an innocent purchaser for value; can they be recovered?

(c) Upon receipt of the order, Marshall Field & Co., telegraphs to John Adams, merchant, asking if he is the person who ordered the goods. John Adams, the farmer, receives the message, and answers—"Order all right. Send goods at once.

JOHN ADAMS, Merchant."

The goods are sent as aforesaid. Discuss.

58. A, residing in Iowa City, owns land in Illinois. He appoints B his agent to sell the land, and to execute a deed therefor in conformity to the laws of Illinois; the contract is made in Iowa City and is not under seal. B goes to Illinois, sells the land to C, and executes a warranty deed under seal. Is the deed valid?

59. A is killed instantly by the Rock Island Railway Co., through the negligence of its servants. An administrator is appointed one year after his death. An action is brought by the administrator eighteen months after his appointment.

(a) A is severely injured and lives about an hour, the administrator is appointed and action brought as aforesaid; is the action barred?

60. A, a resident of Illinois, makes a contract in that State, for sale of personal property. No part of the purchase price

was paid and no part of the property delivered; he violates his contract, removes to Iowa, and is sued for breach of contract in the courts of that state. Discuss.

Martin J. Wade.

PRIVATE CORPORATIONS.

Corporations and their nature.—Defined as “A collection of many individuals united in one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive, according to the design of its institution or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence.”¹ Also as “Bodies politic created and devised by human laws for the purpose of society and government.”² Again as “An artificial being, invisible, intangible, and existing only in the contemplation of law.”³

A corporation is, in general, to be treated as not distinct from the members that compose it, although it has an abstract existence similar to that of the state as distinguished from its citizens. Thus a suit brought by or against a corporation is to be regarded as a suit by or against the stockholders of the corporation, and these stockholders are treated as citizens of the state creating the corporation.⁴

The power to create Corporations.—The power at common law to create corporations was vested in the Sovereign, and to this power the several states of the United States succeeded.

¹ 1 Kyd on Corp. 13.

² 1 Blackstone, 467.

³ Dartmouth College v. Woodward, 4 Wheat. 636.

⁴ Muller v. Dows, 94 U. S. 445.

The restrictions upon this power are: (1) Constitutional, or self-imposed by the restrictions contained in the state constitution; (2) Federal, as imposed by the powers delegated by them to the Federal Government. This power was recognized even where the state withdrew from the federal union.¹

With the state the power to create corporations is a part of its sovereignty.² The federal government has only such powers as were delegated to it by the several states forming the union.³ Though the federal government has only those powers delegated to it, it is sovereign in the exercise of those powers and therefore can erect a corporation to accomplish the objects for which the government was organized.⁴ An illustration was the United States Bank. Also see the incorporation of the Nicaragua Canal.

Classification.—Corporations are classified (1) according to the number of their components, and (2) according to their nature.

Under the first classification they are either (a) Aggregate, consisting of two or more persons united into one society; (b) Sole, consisting of one person only and his successors in a particular station.

Under the second classification they are either (a) Ecclesiastical, or created for the public worship of God, or where the members that compose it are entirely spiritual persons; (b) Lay, created for secular purposes; and as Lay, they are either (1) Civil, created for a variety of temporal purposes; (2) Eleemosynary, created for purposes of charity.

Corporations are divided also into (1) Public, (2) Private. There is a very marked difference between these two classes, and they are therefore governed by principles of law which are very distinct.

Private corporations are societies or associations formed by the voluntary agreement of the members composing them.

¹ U. S. v. Insurance Co.'s, 22 Wall. 99.

² Thomas v. Dakin, 22 Wend. 9.

³ McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S., 9 Wheat. 738.

⁴ McCulloch v. Md. 4 Wheat. 316.

Public corporations are not dependent upon voluntary association, and there is no contract binding those who compose them; they are created by law, for public purposes. This latter division will be fully treated in a subsequent article to appear in these pages.

Manner of Incorporation.—By the Federal Government, it is by act of Congress.

By the several states, corporations are chartered either by special act or under general laws.

Many of the state constitutions provide that no special act of incorporation shall be passed. Thus the constitution of Iowa declares: "No corporation shall be created by special law, but the general assembly shall provide by general laws, for the organization of all incorporations hereafter to be created, except as hereinafter provided."

The general corporation law made necessary by this provision, was a part of the Code of '51.¹

Corporations formed under it by the association of any number of persons have the following general powers:

1. Perpetual succession.
2. To sue and be sued by its corporate name.
3. To have a common seal, which it may change at pleasure.
4. To render the interests of stockholders transferable.
5. To exempt private property of its members from liability for corporate debts, except as otherwise provided.
6. To make contracts, acquire and transfer property.
7. To establish by-laws.

The mode of incorporation under the state of Iowa is publication for four weeks in succession in a newspaper. Such notice of application for incorporation must contain:

1. The name of the corporation and its principal place of business.
2. The general nature of the business to be transacted.

¹ Code of Iowa, Sec. 1058, as amended by 22 G. A. Chap. 86, § 2.

3. The amount of capital stock authorized, and the time and conditions on which it is to be paid in.

4. The time of the commencement and termination of the corporation.

5. By what officers or persons the affairs of the corporation are to be conducted, and the time at which they will be elected.

6. The highest amount of indebtedness to which the corporation is at any time to subject itself.

7. Whether private property is to be exempt from corporate debts.

A substantial compliance with all the provisions of the statute is required.¹

Corporations are divided under the statute into (1) Corporations not for profit; (2) Corporations for profit. The first class embraces all corporations for charitable or religious purposes, being formed for the administration of charitable trusts, or the advancement of religion, or knowledge of the sciences, and not for the profit of the incorporators themselves. Colleges and academies are usually placed under this division and governed by the same principles of law. Those for profit embrace all those associations which are incorporated for the purpose of benefit to their members, and are such as banks, manufacturing or railroad companies, and others of a similar character.

Operative words of incorporation.—No form of words is necessary. The most usual are *found, erect, establish* and *incorporate*.

If there be a grant of powers, privileges, rights, or franchises to a body of individuals designated by a collective name, and these powers cannot be enjoyed without corporate existence, a corporation is said to be created by implication.²

The Contract.—Where a number of persons associate themselves together and act in a corporate capacity, claiming

¹ *Rogers v. Danby Univ. Society*, 19 Vt. 187; *Newcomb v. Benjamin*, 12 Allen, 362.

² 1 Beach, *Priv. Corp. Chap. I*, § 7.

authority to so act, they are to be considered a corporation *de facto*. Such an association cannot constitute a corporation *de facto*, unless the members composing it can form a corporation *de jure*.¹ Their existence can be questioned only by the state by proceedings upon a *quo warranto*, and not collaterally by the members themselves or those dealing with it.²

The charter contains (1) a contract between the state incorporating the society and the incorporators or members composing it;³ (2) a contract between the incorporators or members themselves;⁴ (3) a contract between the incorporators and third parties.⁵ While the legislature can repeal a charter, suspend it, alter or modify it, and take it away, yet it cannot impose a new one upon the stockholders or oblige them to accept it.⁶

Where a charter is granted not subject to any reserved power of amendment, the consent of the corporation is necessary to render the legislative action complete. This consent is given by the stockholders themselves, and not by the corporation as such.⁷

For the transaction of all business in the ordinary line of the purposes for which the corporation was chartered, the majority control the minority, and their action is binding upon all the incorporators.⁸ But a dissenting stockholder cannot be held either by a statute passed after his becoming a member of the corporation, nor by a vote of the directors, nor by a majority of the stockholders, to a vital and material change of the terms of the contract. *Beach Priv. Corp. Chap. III, § 42.*

No charter can be dissolved except by unanimous consent, prior to the period fixed in the articles of incorporation, unless otherwise provided by their articles.

But it is conceded that a corporation may forfeit its

¹ *Evenson et al. v. Ellingson et al.* 37 Wis. 634.

² *Jones v. Kokomo Bldg. Assn.* 77 Ind. 340.

³ *Bank etc. v. Knoop*, 16 How. 369.

⁴ *Clearwater v. Meredith et al.* 1 Wall. 26.

⁵ 1 *Beach Priv. Corp. Chap. VIII.*

⁶ *Zabriskie v. Railroad Co.* 18 N. J. Eq. 178.

⁷ *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579.

⁸ *Union Agri. and Stock Assn. v. Neill*, 31 Iowa 25.

charter or franchises by neglecting to comply with statutory provisions or by the misuse of its privileges or by non-use of same.¹

A corporation has perpetuity or continued existence, and in those states in which the life of the corporation has been limited by legislation, such perpetuity or continued succession can be acquired by a renewal of the charter of incorporation.²

Capital and Capital Stock.—The capital of a corporation is the sum which results from the subscriptions of the original subscribers, and from the profits and gains resulting from the carrying on of the business of the corporation, less the necessary expenses and losses. That part of the capital which is the result of the *original* subscriptions is called the original capital; that which is produced by the carrying on of the business is called the *resulting* capital, and this latter may be distributed by the directors or management of the corporation, as the corporation may see proper.

There is also a very wide distinction between the capital and the capital stock. The former is the property of the corporation, and the capital stock is the sum of the individual interests in the corporation. That is, the capital is the fund existing upon the basis of corporate entity, and the capital stock is the fund looked at from the standpoint of the stockholder taken as an individual, each person's interest being measured by the number of shares of the capital stock which he holds, and each share being one of the equal parts of the capital stock, the capital stock being divided into a certain number of shares each with a definite value. The capital and the capital stock are equal when the corporation begins its business. When, however, the resulting capital is added to the capital, individual interests in it are added to the capital stock, so the ratio remains the same, which may be stated thus, the original capital plus the resulting capital equals the capital stock plus the sum of interests in the resulting capital accruing to each stockholder, such individual interest depending upon the number of shares held by the member.

¹ Commonwealth v. Bank, 28 Pa. St. 383.

² Code of Iowa, Sec. 1069.

The capital stock of a corporation is known as either *common* or *preferred*. Common stock means such stock as entitles the holders of it to an equal share in the profits, this division of the profits being made pro rata among the stock holders, no one of whom having any preference or advantage over the others. Preferred stock is such as entitles the the owners to dividends or their shares out of the profits in preference to those holding common stock, thus having a priority in the dividends. The right to issue preferred stock is obtained through the statute or by its charter, and did not exist at common law. The rights of the owner of preferred stock depend upon the provisions found in the certificate of stock, upon the terms of the contract of which the certificate is the evidence, and upon the statute conferring the right to issue such stock. Holders of preferred stock have the right to vote at the meetings of the corporation and are equal in the exercise of the rights belonging to stockholders. The advantage being that of a right to dividends if there be funds applicable for such purpose prior to the payment of any dividend upon the common stock, and not that of a creditor.¹

Membership.—In associations not having capital stock the requirements for membership are stated in the charter or by-laws of such association. It is not necessary that a church society or religious body be connected with any incorporated or unincorporated society. But membership in one, if there is such a connection, does not constitute membership in the other.

In associations having capital stock membership consists in the ownership of at least one share of such stock. No election for admission is necessary, for the actual ownership of stock carries with it all the rights and privileges of membership. Membership is gained by signing for a certain number of shares of stock in the articles of incorporation, or by applying for such shares and they being assigned to the applicant, or by a transfer of shares from one person to another,

¹ Warren v. King, 108 U. S. 359.

It is not necessary that the owner of shares in a stock corporation have a certificate of stock; he is answerable if his name appear upon the list of stockholders. And this doctrine has been held true, even though the person had acquired stock by transfer, and such transfer was entered upon the books of the corporation but no certificate issued.¹ Where an agreement was to subscribe for stock in a corporation which was the result of a combination of several other corporations, it was held that the corporation had a legal existence at the time of subscription, even though this agreement to consolidate had to be filed with the Secretary of State, and though the defendant had agreed to take shares prior to the filing of such agreement.²

Where a person, however, agrees to subscribe for shares in a future corporation, he may be sued upon such contract, but cannot be held as a stockholder. Here the contract does not become complete until he actually subscribes.³

Members of a corporation have a right to inspect the books and records of such corporation, but not for any ulterior purposes, such as for speculation or idle curiosity. It is necessary that the member show some definite reason, and that such reason be a sufficient one.⁴

In England the general rule as to the withdrawal of a member is that it be done with the assent of all the subscribers, in this country the rule is that the assent of all the creditors as well as the assent of the subscribers must be obtained. However, a person ceases to be a member when he transfers all his stock to another, but in case he is unable to transfer or sell such stock, he cannot escape liability for corporate debts by treating his shares as forfeited.⁵ It is necessary that actual consent be given by one in order to make him a stockholder, and when an agent puts A's name on the subscription list, A can not

¹ *Bank v. Gifford*, 47 Iowa 575.

² *McClure v. Railway Co.* 90 Pa. St. 269.

³ 80 N. Y. 819.

⁴ *Kellogg v. Ingersoll*, 3 Pick. 96; *Commonwealth v. Phoenix Ins. Co.* 106 Pa. St. 111, (117).

⁵ *Mills, et al v. Stewart*, 41 N. Y. 384.

be held,¹ nor can he be held if there is a vital change in articles of agreement of subscription after he has signed same, although such change was made prior to incorporation.²

There is no power of expulsion except those obtained under the statute or charter in corporations having capital stock. In clubs or societies the power of expulsion is regulated by the by-laws and such by-laws must be in conformity to the constitution. But such expulsion can only be made after notice and hearing. The member is entitled to "his day in court."³

The members of a corporation at common law are not liable for the corporate debts. This is wherein a corporation differs from a partnership. The capital stock is the fund to which the creditor may go for the payment of his demand. And the capital stock includes not only the funds on hand, but the unpaid shares and balances due on same.⁴ And the rights of the creditors to such funds are precedent to the rights of the stockholders, or one who stands upon their rights.⁵ In general, where a stockholder disposes of his shares to the corporation and receives in exchange a part of the capital stock, he holds that money subject to rights of the creditors, and such stockholder may be compelled to return such money.⁶

Rights and Liabilities: Corporation, Stockholders, Creditors.—There is a very important difference between a corporation in the eyes of the law and in equity. The creditors, at law, have only the property which is under the corporate name from which to get satisfaction for the claims, therefore, in case of dissolution the creditor is without remedy. In equity, however, the capital which has been subscribed as well as the capital paid in on such subscription, is regarded as a substitute for that individual liability which a creditor has a right to enforce against the individual debtor. Therefore, the capital, although not paid in by the stockholder, is subject to the de-

¹ *McCully v. Railroad Co.* 33 Pa. St. 26.

² *So. Hotel Co. v. Newman*, 30 Mo. 118.

³ *Stephens v. Loan Assn.* 76 Ind. 110.

⁴ *State v. Com. St. Bank*, 44 N. W. Rep. 998.

⁵ *Hightower v. Thornton*, 58 Am. Dec. 412.

⁶ *Crandall v. Lincoln*, 58 Conn. 73 (100); *Kohl v. Lillenthal*, 81 Cal. 378.

mand of the corporation creditor in the same manner in which all property of an individual is within reach of his creditor.

In all transactions the capital of the corporation is held out to the party dealing with the corporation as a security and from this it follows that a corporation is guilty of fraud when it impairs its capital or puts property out of the reach of a creditor who became such upon the strength of such security. This doctrine does not give to the creditor any right as to the management of the corporation. Like any other debtor, it retains the right to manage its business and property. In the case of *Mills vs. Railway Company* (L. C. 5 Ch. 621) the court held that "a simple contract creditor of a company cannot sustain a bill to restrain the company from dealing with their assets as they please, on the ground that they are diminishing the fund for payment of his debt," and also that "a share-holder in a company who seeks to restrain the company from doing an *ultra vires* act must show, by distinct and definite averments, the illegality of the act." This doctrine goes to the extent that insolvency does not take away the right to manage the business of the company. In equity, the directors of a company become quasi trustees for the creditors, when the corporation becomes insolvent.¹

If the directors during solvency waste the funds of an incorporated company, they can be restrained at the instance of the creditors. Where the directors themselves are the parties in default, an application for a receiver may be filed.²

Let it be understood, however, that when a creditor desires to recover in an action of debt, his remedy is in the first place an action at law, and proceed to judgment and execution, and in order that he may bring his suit in equity, he must show that the legal remedy would be inadequate and that he would suffer unless he be given a remedy more searching than that allowed him at law. As to the doctrine of preferring creditors the general principle seems to be, that as between the creditors of an insolvent corporation,

¹ *Marr v. Bank*, 4 Cold. 471.

² *Conrow v. Grey*, 4 How. Prac. Rep. N. Y. 106.

equality is equity. A corporate body can make an assignment of its property in trust, for the payment of its just debts, preserving in such assignment that each creditor shares equally according to the amount of his claim. And it has been held that a banking corporation is a trustee, not only for the stockholders, but also for the creditors, who have a *prior and paramount equity*.¹

Where one has given credit to a corporation and he finds when he comes to collect his claim, that prior to the time in which he gave the credit to the corporation, it had withdrawn a part of its capital, thereby depriving him of a part of the security by which he had been induced to give the credit, the courts have held that he might follow the capital withdrawn, wherever it may have gone. The courts have even gone so far as to hold that where capital stock was issued to a person as paid in full, and not liable to further claims from the corporation, creditors subsequent to the issuing of such stock, could maintain an action against the holders of the stock and recover the difference between what had been paid and the par of such stock. The relation of a stockholder to the corporation, and to the public who deal with the corporation, are such that every transaction between the stockholder and the corporation be made in good faith and with fair dealing, where such transaction may seriously affect the rights of the creditor or of the general public.²

The promoters of a corporation made a purchase of land, and the deed was made direct to the corporation. The corporation issued bonds secured by mortgage on the land which they had purchased, and did not pay out a cent on the purchase; they gave these obligations for four-fifths of the entire purchase money and another obligation to pay off the outstanding mortgage for the remaining one-fifth. At a regular meeting of the directors it was voted to value the property at twice the purchase price, such valuation being allowed by the statutes of the state, and then voted to credit this land as if it had been

¹ *Robins v. Embrey*, 1 S. & M. Ch. Rep. Miss. 207.

² *Sawyer v. Hoag*, 17 Wall. 610.

contributed by them individually, as being a fifty per cent payment upon the stock. The doctrine laid down upon suit by a creditor of the corporation, was that as against such creditor the allowance of fifty per cent on the subscriptions of the stockholders was invalid, and that they were liable for the whole amount of their subscriptions as appeared in the certificate of organization.¹

A creditor recovered judgment against a banking corporation, which had become insolvent on account of the interference of military authorities during the war, and at the time of the action the assets of the corporation were in the hands of some of its officers; the writ of execution was returned *nulla bona*; the plaintiff then brought a bill in equity asking that his judgment be satisfied in full out of the funds in the hands of these officers. The counsel for the creditor contended that while the other creditors of the corporation might have set up a defence that the assets were a trust fund for their benefit, yet the corporation could not do so, for it would then be analogous to a debtor claiming a valid defence on the ground that there were other obligations, which he could not meet if plaintiff recovered. The answer was, that immediately following insolvency, the officers became quasi trustees for the benefit of creditors. And the court held that the execution creditor must come in pro rata with the other creditors.²

The Rights and Liabilities of Trustees—In an action brought by the plaintiff against the defendants as stockholders of an incorporated company, the defendants set up in defense denying that they were ever stockholders, or subscribers to the stock of the corporation, and setting forth that the stock alleged to be theirs was merely deposited with them by the corporation in trust for a temporary purpose by way of collateral security, to be returned when that purpose was accomplished. In this case the court took the position that the intention of the parties was to govern unless the intention could be shown to conflict with some positive rule of law, and here it was evidenced by

¹ *Wetherbee v. Baker*, 36 N. J. Eq. 501.

² *Marr v. Bank*, 4 Cold. 471.

the terms of the document, which stated that the stock was to be held in *escrow*, and though the nature of the deposit was shown to be not strictly what the technical terms would indicate, yet the stock was shown to be deposited with the defendants for purposes other than that of making them subscribers. It was admitted that they never had in reality subscribed nor agreed to do so, and also that the object of the deposit was to put the control of the corporation temporarily in defendants' hands. It was said by the plaintiff that it was against public policy that a corporation should have the power to put its unused stock into the hands of pledgees. The court decided that there was no valid distinction in this respect between the case of a pledge by an individual and a pledge by the corporation. As to creditors, the court held that they were in no worse position in this case, than they would have been in the case of a pledge at the hands of a private individual. The question as to whether the defendants were estopped from denying that they were stockholders by the fact that they had voted on these shares, it was held that as against creditors, could not be prejudiced by the voting one way or the other. The court held that stock so pledged as collateral security was part of the assets of the corporation and primarily liable before all creditors, as belonging to the corporation and not to the pledgee, and such pledgee is not liable as a stockholder.¹

Transfer of Shares in an Existing Corporation.—The doctrine is that the transferee becomes liable. The effect of a transfer of shares in an existing corporation by A to B, is to substitute B the transferee for A the transferor. In an action upon a bill filed by the assignee in bankruptcy of a corporation against the defendant on the ground that he was the holder of a certain number of shares of stock, on which about one-fifth of the par value had been paid and the demand was for the payment of the balance, the defendant set up that he was not a subscriber to the stock and had made no promise to pay. The

¹ *Burgess v. Seligman*, 107 U. S. 20.

court held him liable and pointed out that in the three methods by which a man becomes a stockholder there is never an express promise to pay and that the ownership of the stock was sufficient to show liability for all the legitimate debts on the stock.¹

The transferee, or he who has the legal ownership of the stock at the time a dividend is declared, is entitled to the dividend.² When a dividend was declared after a transfer of stock, but the evidence showed that those dividends had been earned prior to the date of such transfer, it was held that the right of the transferee to such dividend depended upon the time that the dividend was declared and not when it was earned.³

Liability for Torts and Crimes.—A corporation is liable for the wrong it commits, whether such wrong was done in the ordinary course of its legitimate purpose, or not.⁴ It is liable for the torts of its agents and is therefore analogous to an individual under the same circumstances, and it is so liable whether the act was authorized either directly or impliedly. A corporation may be sued for malicious prosecution instituted by an agent, the corporation being made a joint defendant with the agent. It is liable for a misrepresentation by its servants while acting within the limits of their employment, and may be sued for fraud.⁵

Where a corporation through its management allowed a libellous article to be published in connection with a report of an investigation, it has been held sufficient ground for an action of libel against the corporation, as well as when an agent within the scope of his authority, published such an article. An action may be brought for assault and battery committed by its officers or servants in carrying out the rules of the corporation,⁶ and for a number of other torts and crimes,

¹ Webster v. Upton, 91 U. S. 65.

² Hill v. N. Co., 71 N. Y. 598.

³ Hyat v. Allen, 56 N. Y. 553.

⁴ P. & R. R. Co. v. Quigly, 21 Howard 309.

⁵ Candy v. Globe Rubber Co. 37 N. J. Eq. 175.

⁶ Hewitt v. Swift, 3 Allen 430.

it being a settled rule that the corporation can not hide behind the mask of incapability to do acts other than those within its corporate powers.

Ultra Vires Acts.—Ultra vires means any act of a corporation which it is not authorized to do, either by express or implied powers conferred upon it by the act of incorporation. Any act which is ultra vires, or without the scope of the powers granted by the corporate charter or statute, may be made a ground for action by the state, a stockholder, the corporation or a person dealing with the corporation, but this right of action does not belong to either or all for every act done, there being a wide difference as to who may bring the action. An act need not be unlawful, or such as the corporation can not do, to make it ultra vires, but such as do not come within the powers granted to it. An act which is illegal or prohibited may or may not be recognized at law; a penalty may follow the commission of such an act, and yet the act may be recognized by the courts. Thus a corporation may be held liable for its torts, yet no authority is given by law, to a corporate body to commit a tort. A contract made by a corporation in excess of the powers or rights given to it, may have all the elements of a valid contract, while unperformed may be voidable, and may result in the imposition of a penalty upon the corporation for exceeding the rights which it has at law, and yet the corporation can not set up such contract in order to escape its own liability.

Where property is acquired by an act which is ultra vires, the corporation can not retain the property, and at the same time defend itself from the obligation of such act or acts. The corporation is compelled to account for benefits it derives from any source, even though the act could not have been enforced against it.

A lease or sale of one railroad to another, without proper authority, is not within the powers of the stockholders or directors, where one stockholder dissents to such sale or transfer. Such an act would be in violation of the contract between

the corporation and stockholder and is therefore an *ultra vires* act, and the dissenting stockholders may obtain an injunction against the transfer, or may bring an action in a court of equity and have the transfer set aside, if already made.¹

Neither the board of directors or a majority of stockholders can alter the conditions of the contract, where the change contemplated would effect the rights of those stockholders who dissented. The court holding in the case of *Kean v. Johnson*,² that "a majority of stockholders in a prosperous corporation, cannot at their own caprice, sell out the whole source of their emoluments and invest their capital in other enterprises, where the minority desire the prosecution of the business in which they had engaged."

Where the act committed by a corporation is *ultra vires*, the state may object to such act by *quo warranto*, but it has been held that the state can not proceed by injunction against a corporation to prevent it from committing an *ultra vires* act.

Powers of Foreign Corporations.—A corporation chartered under the laws of one state can not transact business in another state except upon complying with the laws of such state. It can have no absolute right, but depends entirely upon the comity of states. The state may exclude the foreign corporation or compel it to confine its business to a certain locality.³ The power to impose restrictions and require the performance of certain conditions by the foreign corporation before it can enter upon its business, belongs to the state which it seeks to enter. A corporation resides in the state of its creation and can not remove from it. Therefore, it does not become a domestic corporation by purchasing property in another state. But a corporation may be chartered by two states, and have the same powers, and be designed to do the same thing, but it is two distinct corporations, and holding those powers and rights separately by the incorporating act of each state.

¹ *Kean v. Johnson*, 9 N. J. Eq. 401.

² *Kean v. Johnson*, 1 Stock, Ch. 401.

³ *Doyle v. Central Ins. Co.* 94 U. S. 585.

No state, however, can create a corporation and send it forth to do business in another state while preventing it from doing business in the state of its creation.¹

Actions.—One of the powers of corporations is to sue, and of course as a natural sequence, be sued in its corporate name. In this respect a corporation has the same power or capacity as an individual. It can bring actions, compromise them, and refer matters to arbitration.² This is expressly provided by the constitution and statutes of many states. The Code of Iowa provides that a plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and where a defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in like manner. However, if the allegation is controverted the facts relied on must be specifically stated.

Service may be made upon any agent of the corporation within the county where suit is begun, or upon any agent transacting said business in any other county, if none be found in the county in which suit is commenced. And this is not an infringement of its rights to sue and be sued like natural persons.³ A corporation may sue for libel, to restrain a nuisance or enjoin others from using its corporate name to its detriment in its business.

It is not necessary that the corporation allege every fact necessary to its existence. It is sufficient in pleading the charter to allege that the corporation was duly incorporated, but it may be made to state whether it is a foreign corporation or a domestic one. Corporations must plead as to facts, but it can not do so under oath, but nevertheless it must answer fully. Some officer, as the president or the secretary,

¹ *Railway and Trust Co. v. Co. Com.* 6 Kan. 345.

² *Stewart v. Hoyt*, 111 U. S. 373; *Canal Co. v. Swann*, 5 How. 83; *B. and L. R. R. Co. v. N. etc. R. R. Co.* 130 Mass. 463.

³ *Life Ins. Co. v. Pruett*, 74 Ala. 437.

who is able to fully state the facts, should make the answer and he does so under oath, setting forth his connection with the corporation.¹

The allegation is sufficient if it states that the defendant is a private corporation, or if it designates a railroad company by its corporate name, and it need not state under what authority it was incorporated or what are its corporate powers.² Where it is alleged that a certain contract was made by the corporation signed by its proper officer, the want of authority to make such contract on the part of the officer, is a matter of defense and the plaintiff need not aver that the officer had such authority.³

Where a corporation is known by more than one name, a plea in abatement is the only advantage it can take for a misnomer. But when two corporations are known by one and the same name, recovery can not be had against the second for wrongs committed by the first, unless they are proven to be identical and such identity must be alleged in the petition.

Nor can a person dealing with a *de facto* corporation and benefitting by his contract, allege that in reality such a corporation never existed. The rule being, that the validity of a corporation can not be questioned collaterally by those claiming rights adverse to it, but only by the state.⁴ Where corporate capacity is denied, it should be by answer, and not be raised on demurrer. But where there is a failure to allege that a party is a corporation, as the statute requires, it is ground for demurrer. But where suit is brought by a corporation and its existence is denied, this denial may be pleaded in bar or in abatement. A general denial that a party is a corporation, does not make an issue. When defendant has pleaded the general issue, it is not necessary that the corporation prove its corporate existence. This is true in suits within the federal and state courts.⁵ Where in a suit by or against a corpo-

¹ *Macaulay v. Bromell*, 67 How. Pr. 252; *Ex. parte, Cinn. Selma, etc., Ry. Co.* 78 Ala. 258.

² *Houston, etc., v. Kennedy*, 70 Tex. 228; *Stanly v. Richmond R. Co.* 89 N. C. 321; *Adams Ex. Co. v. Harris*, 120 Ind. 73.

³ *Malone v. Crescent City, etc., Co.*, 77 Cal. 38.

⁴ *Grand R. B. Co. v. Rollins*, 18 Colo. 4.

⁵ *Rembert v. S. C. Ry. Co.* 9 N. E. Rep. 968; *Union Cement Co. v. Noble*, 15 Fed. Rep. 508; *Ontario State Bk. v. Tibbitts*, 80 Cal. 63.

ration in an inferior court, the opposing party made no objection to the allegation that the party was a corporation, he loses his right to demand proof of corporate existence and can not demand such proof upon appeal.

Dissolution.—Most states have provided for the dissolution of a corporation by statute. The law in Iowa being that “No corporation can be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles.” Where the term of existence is fixed at the time of incorporation, the corporation becomes *ipso facto* dissolved, unless it has complied with the state regulations for a continuance of its franchise, and the assets will be distributed upon the application of one of its members. The business may be continued also by the formation of a new society upon the completion of the term limiting the life of the former one. Where a corporation has a special charter, its life can not be “cut off” by legislation foreign to the charter.

The corporation is not dissolved by a mere vote of its members in order to escape liability. But the stockholders may dissolve a corporation at any time when such dissolution will not effect the minority or the creditors, though the consent of the state be not given. This is not true where the functions to be performed by the corporation are of a public nature, nor is it allowed except where its continuation would result in failure.¹

The possession of property is not essential to the existence of a corporation, therefore a transfer of all of its property will not dissolve a corporation. But when a corporation can not meet its liabilities, the members or creditors may ask for dissolution by bill in equity. Proceedings in equity for the voluntary dissolution of a corporation are not adverse proceedings and are not appealable on the footing of chancery appeals. No appeal lies except where given by statute.²

¹ 2 Beach Priv. Corp. § 781.

² *Cady v. Knit Goods Mfg. Co.* 28 Mich. 133.

Upon dissolution the right of having a receiver appointed does not accrue to the minority, there being frequently circumstances which will justify the court in making a distribution of the assets. But when a receiver is appointed he becomes a trustee for the benefit of the creditors and stockholders, and he becomes vested with all the corporate interests except the power to do business. The corporation ceases to exist upon the appointment of a receiver. The dissolution of a corporation by any legal process does not injure the creditor in his rights existing at the time of such dissolution, nor does it release the stockholder from his liabilities.

Under the common law a corporation might be dissolved by (1) Act of Parliament; (2) The natural death of all its members; (3) The surrender of its franchise into the hands of the sovereign, a kind of a suicide; (4) Forfeiture of its charter through negligence or abuse of its franchise.

James A. Rohbach.

CASES ON INSURANCE.

[Continued from Number Five.]

II. LIFE INSURANCE.

I. NATURE OF THE CONTRACT; INSURABLE INTEREST; ASSIGNMENT; DISPOSITION OF BENEFIT.

Insurable interest.

- Godsal v. Boldero, 9 East, 72.
- Dalby v. India & L. Assur. Co. 15 C. B. 365.
- Chalfant v. Payton, 91 Ind. 202; 46 Am. R. 586.
- Ruse v. Mutual Ben. L. Ins. Co. 23 N. Y. 516.
- Mutual Ben. Ass'n v. Hoyt, 46 Mich. 473.
- Golden Rule v. People, 118 Ill. 492.
- Lord v. Dall, 12 Mass. 115; 7 Am. D. 42.
- Loomis v. Eagle L. Ins. Co. 6 Gray, 396.
- Goodwin v. Massachusetts Mut. L. Ins. Co. 73 N. Y. 480.
- Mitchell v. Union L. Ins. Co. 45 Maine, 104; 71 Am. D. 529.
- Reserve Mut. Ins. Co. v. Kane, 81 Penn. St. 154; 22 Am. R. 741.
- Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35; 22 Am. R. 180.
- Lewis v. Phenix Mut. L. Ins. Co. 39 Conn. 104.
- Singleton v. St. Louis Ins. Co. 66 Mo. 63; 27 Am. R. 321.

Currier v. Continental L. Ins. Co. 57 Vt. 496; 52 Am. R. 134.
 Chisholm v. National Capitol Ins. Co. 52 Mo. 213; 14 Am. R. 414.
 Morrell v. Trenton Mut. L. Ins. Co. 10 Cush. 282; 57 Am. D. 92.
 Bevin v. Connecticut Mut. L. Ins. Co. 23 Conn. 244.
 Connecticut Mut. Ins. Co. v. Luchs, 108 U. S. 498.
 Hebdon v. West, 3 Best & Smith, 578.

Policy for benefit of another.

American L. Ins. Co. v. Robertshaw, 26 Penn. St. 189.
 Aetna L. Ins. Co. v. France, 94 U. S. 561.
 Keystone Mut. Ben. Ass'n v. Norris, 115 Penn. St. 446.
 Bloomington Mut. Ben. Ass'n v. Blue, 120 Ill. 121; 60 Am. R. 558.

Termination of insurable interest.

Connecticut Mutual L. Ins. Co. v. Shaefer, 94 U. S. 457.
 Rawls v. American L. Ins. Co. 27 N. Y. 282; 84 Am. D. 280.
 Scott v. Dickson, 108 Penn. St. 6; 56 Am. R. 192.
 Appeal of Corson, 113 Penn. St. 438; 57 Am. R. 479.

Assignment.

Anthracite Ins. Co. v. Sears, 109 Mass. 383.
 New York L. Ins. Co. v. Flack, 3 Md. 341; 56 Am. D. 742.
 Bursinger v. Bank, 67 Wis. 75; 58 Am. R. 848.
 Mutual L. Ins. Co. v. Allen, 138 Mass. 24; 52 Am. R. 245.
 Clark v. Allen, 11 R. I. 439; 23 Am. R. 496.
 Warnock v. Davis, 104 U. S. 775.
 Insurance Co. v. Armstrong, 117 U. S. 591.
 Curtiss v. Aetna L. Ins. Co. 90 Cal. 245; 25 Am. St. R. 114.
 Murphy v. Red, 64 Miss. 614; 1 So. R. 761.
 Fitzpatrick v. Hartford L. etc. Co. 58 Conn. 116.
 Gilbert v. Moose, 104 Penn. St. 74; 49 Am. R. 570.
 Stevens v. Warren, 101 Mass. 564.
 Missouri Val. L. Ins. Co. v. Sturges, 18 Kan. 93; 26 Am. R. 761.
 Missouri Val. L. Ins. Co. v. McCrum, 36 Kans. 146; 59 Am. R. 537.
 Roller v. Moore's Adm'r, 86 Va. 512.
 Equitable L. Ins. Co. v. Hazlewood, 75 Tex. 338; 16 Am. St. R. 893.

Change of Beneficiary.

Lemon v. Phoenix Mut. L. Ins. Co. 38 Conn. 294.
 Eadie v. Slimmons, 26 N. Y. 9; 82 Am. D. 395.
 Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419; 4 Am. R. 328.
 Gosling v. Caldwell, 1 Lea, 454; 27 Am. R. 774.
 Robinson v. Duval, 79 Ky. 83; 42 Am. R. 208.
 Ricker v. Charter Oak L. Ins. Co. 27 Minn. 193; 38 Am. R. 289.
 Glanz v. Gloeckler, 104 Ill. 573; 44 Am. R. 94.
 Central Bank v. Hume, 128 U. S. 195.
 Clark v. Durand, 12 Wis. 223.
 Gambs v. Covenant Mut. L. Ins. Co. 50 Mo. 44.
 Union Mut. L. Ins. Co. v. Stevens, 19 Fed. R. 671.

Mutual Benefit Certificates.

- Commonwealth v. Wetherby, 105 Mass. 149.
 State v. Merchants Ex. etc. Soc'y, 72 Mo. 146.
 State v. Iowa Mut. Aid Ass'n, 59 Iowa, 125.
 State *ex rel.* v. Nichols, 78 Iowa, 747.
 United Breth. etc. Aid Soc'y v. McDonald, 122 Penn. St. 324; 9 Am. St. R. 111.
 Price v. Knights of Honor, 68 Tex. 361.
 Knights of Honor v. Watson, 64 N. H. 517.
 Marsh v. American Legion of Honor, 149 Mass. 512.
 Rollins v. McHatton, 16 Colo. 203; 25 Am. St. R. 260.
 Martin v. Stubbins, 126 Ill. 387; 9 Am. St. R. 620.
 Luhrs v. Luhrs, 123 N. Y. 367; 20 Am. St. R. 754.
 Schmidt v. Iowa Knights of Pythias Ins. Ass'n, 82 Iowa, 304.
 Hainer v. Iowa Legion of Honor, 78 Iowa, 245.
 Bailey v. Mutual Ben. Ass'n, 71 Iowa, 690.

Disposition of Proceeds.

- Gould v. Emerson, 99 Mass. 154 96; Am. D. 720.
 Kerman v. Howard, 23 Wis. 108.
 Hooker v. Sugg, 102 N. Car. 115; 11 Am. St. R. 717.
 Amick v. Butler, 111 Ind. 578; 12 S. E. R. 518; 60 Am. R. 722.
 Phillips v. Carpenter, 79 Iowa, 600.
 Britton v. Supreme Council, 46 N. J. Eq. 376; 19 Am. St. R. 376.
 McClure v. Johnson, 56 Iowa, 620.
 Kelly v. Mann, 56 Iowa, 625.
 Connecticut Mutual L. Ins. Co. v. Baldwin, 15 R. I. 106.
 Cleaver v. Mutual etc. L. Ass'n (Q. B. D. 1891); 44 Albany, L. J. 382.

2. REPRESENTATIONS AND WARRANTIES; CONDITIONS AS TO PREMIUMS.

- Campbell v. New England Mut. L. Ins. Co. 98 Mass. 381.
 Miller v. Mutual Benefit L. Ins. Co. 31 Iowa, 216; 7 Am. R. 122.
 Hartwell v. Alabama L. Ins. Co. 33 La. Ann. 1353; 39 Am. R. 294.
 Hartman v. Keystone Ins. Co. 21 Penn. St. 466.
 Grattan v. Metropolitan Ins. Co. 92 N. Y. 274; 44 Am. R. 372.
 Providence L. Ins. Co. v. Fennell, 49 Ill. 180.
 Anderson v. Fitzgerald, 4 H. L. Cas. 484.
 Wilkinson v. Conn. Mut. L. Ins. Co. 30 Iowa, 119; 6 Am. R. 657.
 Moulor v. American L. Ins. Co. 111 U. S. 335.
 Vose v. Eagle L. Ins. Co. 6 Cush. 42.
 Perrins v. Marine etc. Ins. Co. 2 El. & El. 317.
 Baker v. Union Mut. L. Ins. Co. 43 N. Y. 283.
 Pitt v. Berkshire L. Ins. Co. 100 Mass. 500.
 Brown v. Northwestern Legion of Honor, 81 Iowa, 400.
 Germania Ins. Co. v. Rudwig, 80 Ky. 223.
 Walsh v. Aetna L. Ins. Co. 30 Iowa, 133; 6 Am. R. 664.

Masonic Mutual Ben. Ass'n v. Beck, 77 Ind. 203; 40 Am. R. 295.
 Cotton States L. Ins. Co. v. Edwards, 74 Ga. 220; 18 Rep. 584.
 Newman v. Covenant Mut. L. Ins. Ass'n, 76 Iowa, 56.
 McArthur v. Home L. Ass'n, 73 Iowa, 336.

3. LOSS, WHAT COVERED.

Schneider v. Provident L. Ins. Co. 24 Wis. 28; 1 Am. R. 157.
 Penfold v. Universal L. Ins. Co. 85 N. Y. 317; 39 Am. R. 660.
 Northern Mut. L. Ins. Co. v. Hazelett, 105 Ind. 212; 55 Am. R. 192.
 Insurance Co. v. Terry, 15 Wall. 580.
 Blackstone v. Standard L. & Ac. Ins. Co. 74 Mich. 592.
 Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121.
 Cooper v. Mass. Mut. L. Ins. Co. 102 Mass. 227; 3 Am. R. 451.
 Estabrook v. Union Mut. L. Ins. Co. 54 Maine, 224.
 Sheffer v. Ins. Co. 25 Minn. 534.
 John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41.
 Bigelow v. Ins. Co. 93 U. S. 284.
 Miller v. Mutual Ben. L. Ins. Co. 34 Iowa, 222.
 Scarth v. Security Mut. L. Soc'y, 75 Iowa, 346.

4. SUBROGATION.

Conn. L. Ins. Co. v. N. Y. etc. R. Co. 25 Conn. 265; 65 Am. D. 571.
 Mobile Ins. Co. v. Brame, 95 U. S. 754.
 Gotlieb v. Cranch, 4 DeG. M. & G. 440.
 Drysdale v. Piggott, 8 DeG. M. & G. 546.

III. ACCIDENT INSURANCE.

North Am. Ins. Co. v. Burroughs, 69 Penn. St. 43; 8 Am. R. 212.
 U. S. Mut. Acc. Ass'n v. Barry, 131 U. S. 100.
 Travelers Ins. Co. v. Murray, 16 Colo. 296; 25 Am. St. R. 267.
 Freeman v. Mer. Mut. Acc. Ass'n (Mass. 1892), 30 N. E. R. 1013.
 Trew v. Railway Pass. Assur. Co. 6 H. & N. 839.
 Equitable Acc. Ins. Co. v. Osborn (Ala. 1890), 9 So. R. 869.
 McGlinchey v. Fidelity & C. Co. 80 Maine, 251; 6 Am. St. R. 190.
 Winspear v. Accident Ins. Co. 6 Q. B. D. 42.
 Hutchcraft's Ex'r v. Trav. Ins. Co. 87 Ky. 300; 12 Am. St. R. 484.
 Paul v. Travelers Ins. Co. 112 N. Y. 472; 8 Am. St. R. 758.
 Richardson v. Travelers Ins. Co. 46 Fed. R. 843.
 Bon v. Railway Pass. Assur. Co. 56 Iowa, 664; 41 Am. R. 127.
 Miller v. Travelers Ins. Co. 39 Minn. 548.
 Tuttle v. Travelers Ins. Co. 134 Mass. 175; 45 Am. R. 316.
 Travelers Ins. Co. v. Seaver, 19 Wall. 531.
 Duran v. Standard L. & Acc. Ins. Co. 63 Vt. 437; 25 Am. St. R. 773.

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HYPOTHETICAL CASES IN SALES AND
BAILMENTS.

1. A and B each claims to be owner of a calf which is running in a field used by them in common. B sells and delivers the animal to C who has no knowledge of A's claim. A sues B and recovers judgment for the value of the animal when sold by B. In the meantime the animal has greatly increased in value and A, instead of collecting his judgment against B, brings replevin against C for the animal. Can he recover?

2. Under the circumstances of the foregoing case could A recover from C the present value of the animal? If under the facts stated in question No. 1 A should collect from B the amount of his judgment, who would thereafter be the owner of the animal?

3. A wrongfully takes from B, in Iowa, a colt which he sells to C, who takes it to Kansas. B cannot find the animal and sues A for damages, recovering judgment for \$50, its value when taken. Subsequently B learns that the animal is

in the hands of D, who bought in good faith from C in Kansas, and thereupon demands it from D. But in the meantime the colt has been trained at a considerable expense, and has developed trotting qualities, so that it is worth \$750. D refuses to return the animal, but tenders to B payment of the judgment against A, with lawful interest, that judgment not having as yet been satisfied in whole or in part. B refuses this tender. Can he recover the animal?

4. A thief delivers the stolen property to a commission merchant for sale. The latter, supposing his customer to be the owner, sells the property and after deducting his commission pays the balance to the customer. Can the real owner recover from the commission merchant for conversion?

5. A delivers to B a team of horses with the agreement that B shall keep them as security until A pays a debt due to B. But as a part of the same transaction A executes and delivers to B a bill of sale purporting to convey to B, for a valuable consideration, the title to the horses. B sells the team to C, to whom the bill of sale is shown as evidence that B has title. A having afterwards paid his debt to B, seeks to recover the horses from C. Can he do so?

6. In pursuance of a contract for the sale of grain between A of Iowa City, and B of Chicago, A delivers the grain to a carrier, taking a bill of lading therefor, in which the carrier agrees to deliver the grain at Chicago, to A, or order. This bill of lading, being endorsed by A to B, is sent to a bank in Chicago, attached to a draft for the price of the grain, with direction to deliver the bill of lading to B when the draft is paid. By theft, B procures the bill of lading from the bank without payment, and endorses it to C, who, on the strength thereof, pays value for the grain. Who is entitled to receive the grain from the carrier, A or C?

7. A buys of B and pays for one thousand bushels of wheat to be subsequently delivered. B procures wheat from C pretending to pay therefor in a fraudulent check. This wheat B delivers to A. Can C reclaim the wheat from A?

8. At an auction sale of table ware a package of a dozen table spoons is offered and bid for as plated ware. It is afterward discovered by the auctioneer that the spoons are solid silver. Can he reclaim them from one who bought them from the purchaser and paid for them as solid silver without knowing of the auctioneer's mistake?

9. By transfer of bill of lading, A sells to B a cargo of grain in course of transportation by vessel. It afterwards appears that at the time of the transfer, the grain was already greatly damaged by water, owing to an accident to the vessel, which fact was unknown to either A or B. Can A compel B to pay the agreed price for the grain?

10. Jones by the representation that he is the servant of Smith, and directed to make the purchase of an overcoat on Smith's account, procures the article from a clothier, who charges it to Smith. Jones then sells the overcoat to Brown for value paid. It now appears that Jones had no authority to make the purchase, and the clothier demands the coat from Brown. Is he entitled to recover?

11. It being the custom of book publishers to send supplies of books published to the book sellers, who sell such copies as they can, and after a certain time return the copies unsold, accounting for those sold, would a levy of execution upon the stock of a book seller cover books thus left with him for sale? Would it be material in such case that the book seller had represented to the creditor, for whose debt the execution is issued, that the books in his stock all belonged to him, and that none of them were held merely on commission?

12. A sells to B a threshing machine, B giving notes for the purchase price, and it being stipulated that title shall not pass until the notes are paid. Before time for payment the machine is destroyed by accidental fire without B's fault. Can A collect the notes? Could B before payment sell to C and pass a perfect title? What statutory provision is there in Iowa affecting the answer to the latter question?

13. A safe is sold and delivered on credit, payments to be

made in one, two and three years, the title not to pass until the purchase price is fully paid, when the safe is to be the property of the buyer. After the lapse of three months the safe is rendered worthless by reason of being subjected to intense heat in a fire on buyer's premises, where it has been in use. Can seller recover the installments of purchase price as they fall due?

14. A sells to B his crop of potatoes, grown on a certain five-acre tract of land, and ready for digging, part payment being made. B is to dig and measure them, and pay the balance of the price at the rate of twenty-five cents per bushel. Within two days afterward, and before any of the potatoes are dug, they are all washed away by a flood. Can A recover anything from B, or B from A?

15. The owner of a crib of corn containing about 2,000 bushels, sells and receives pay for 1,000 bushels therefrom, that amount to be measured out and taken away when called for by the buyer. Before any part is taken out about one-half the corn is stolen without the seller's fault, and creditors of the seller levy on the balance. What are the rights of the buyer?

16. The owner of certain piles of cordwood on the bank of a stream sells all the wood with the agreement that it shall be hauled away and measured by the buyer who is to pay a stipulated price per cord for the whole when the number of cords is ascertained. After the buyer has taken away a part, the balance is swept away by a flood. Can the seller enforce payment by the buyer for the portion which is lost?

17. The buyer of cordwood purchases ten cords from a larger quantity, being present at the separation of the particular lot from the common mass. It is then arranged that he shall take it away in a few days. Is he entitled to take it away before paying? If before payment the wood is destroyed can the seller recover the price?

18. A, the owner of a planing mill, having agreed to manufacture for B certain doors, sash and blinds, within thirty

days, completed them within that time, and piled them up on his premises ready to be taken away. The next day after the thirty days expired, but before B had been notified that the manufactured articles were ready for delivery, they were levied upon by A's creditors. Can B recover them from the sheriff? What difference, if any, would it make whether the contract was in writing, or whether the price had already been paid?

19. A orders a cask of wine from B, in Davenport, to be shipped by express c. o. d. to himself in Iowa City. The wine is intended for a lawful purpose. B has a permit to sell in Davenport but not in Iowa City. Will the delivery of the wine by the express company to A, and receipt by its agent of the pay therefor, constitute an unlawful sale by B in Johnson County?

20. A, B and C, residents of Cedar Rapids, each orders a quantity of intoxicating liquors from D. & Co., of Chicago. A's order is given in Cedar Rapids to a traveling agent of D. & Co., who forwards it to the firm in Chicago, and the liquor is sent by express to A. B writes direct to D. & Co., and the liquor is sent by express in response to his order. C orders through an agent of D. & Co. doing business in Cedar Rapids, to whom the liquor is sent, and who delivers it to C. Sales of liquor being valid under the laws of Illinois, and invalid under the laws of Iowa, can D. & Co. recover the price of the liquors sold to A, B and C respectively?

21. An Iowa City merchant orders two bills of goods from different wholesale dealers in Chicago. In one case the goods are delivered to the railway company properly addressed, but without bill of lading. In the other case the goods are billed to the *seller, or order*, at Iowa City, and the bill of lading, indorsed to the Iowa City merchant, is attached to a draft for the price, and mailed to a bank in Iowa City, to be delivered on payment of the draft. While the goods are in transit they suddenly rise in price, and the sellers telegraph, in one case to the railroad agent and in the other to the bank, not to deliver.

What are the rights of the buyer with reference to having the goods in these two cases?

22. A consignment of railroad iron being made by a dealer in Liverpool to a dealer in New York f. o. b., and having been paid for by the New York dealer on receipt of the bill of lading, is afterwards found by the purchaser on its arrival, to be not of the quality ordered. He thereupon directs it to be piled at the wharf, and notifies the seller that it is rejected, and is subject to his order. Thereafter, a creditor of the seller and a creditor of the buyer each cause execution to be levied thereon. Which levy is valid?

23. In pursuance of an oral contract of sale, without payment of any portion of the price, goods are delivered by the seller at Chicago to a carrier, directed to the buyer at Iowa City. The buyer, without reason, refuses to accept. Can the seller recover the purchase price from the buyer?

24. It being orally agreed between the owner of a crop of growing wheat and a grain merchant that the former shall deliver the grain after maturity and threshing of the crop to the latter at a fixed place, and by a specified time, the owner of the crop harvests and threshes it, and takes it to the designated place by the proper time, when the buyer refuses to receive it. Can the owner of the grain maintain action against the buyer for damages for refusal to accept?

25. A father buys, and presents to his daughter, then living at home, a piano, which is placed in the father's house, and used by the daughter, and by all the members of the family generally spoken of as the daughter's piano. Subsequently the daughter marries, and goes to live at the hotel with her husband, allowing the piano to remain at her father's house, where she frequently goes to use it. An execution being levied on the piano by a creditor of her father, can the daughter maintain her right to the piano, as against the levy?

26. A father shows to his son certain notes payable to the father or order, and in the son's presence encloses them in an envelope, endorsing his son's name on the back of the envel-

ope, and then deposits them in a drawer of his desk where other business papers are kept, saying to the son, "These notes are yours and you shall have the money when they are paid." The father dies before the notes are collected. Is the son or the administrator entitled to the notes?

27. The owner of a farm on which is growing a crop of grain not yet matured, makes a verbal gift thereof to his son. Subsequently, on the maturity of the grain, the son, who has in the meantime become estranged from his father, enters upon the father's land, against his directions, and cuts and takes away the grain. Can the father maintain an action of trespass against the son for such acts, and what will be the measure of damages?

28. A man, supposing himself about to die, delivers his watch to a bystander with direction that it be kept for, and given to his son, who is in a distant place. As between the son and the administrator of the deceased father, which is entitled to the possession of the watch? If in such case the father should recover from his illness, but should allow the watch to remain in the possession of the person to whom it was thus given, and should subsequently die from a distinct and separate illness, who would be entitled to the watch?

29. By a written contract, A sells to B on credit certain property on A's premises, which B is to take away within a time specified. Subsequently, before the time for taking the property, A notifies B that he cannot have it except on payment of the price. B thereupon, in A's absence, takes the property without A's consent. There having been no change in the circumstances of the parties in the meantime, can A maintain trespass against B for the taking of the property?

30. A shows to B, a dry-goods merchant, a sample of silk plush, and expresses a wish to purchase three yards of the same goods. B shows A a piece of goods which is cotton plush instead of silk, stating the price, which is the usual price for cotton plush. A asks whether the goods are the same as the sample, and being told that they are, pays for three yards,

which he directs to be delivered at his residence. B states to A that he is not in the habit of delivering goods for customers, but will himself leave the package at A's house in the evening. A expresses his satisfaction and goes away. B cuts off the goods which are done up and laid by, but are afterwards, during the day, destroyed by accidental fire. Can A recover from B the sum paid for the goods?

31. A contracts with B for the purchase of ten cords of wood to be hauled and delivered by B. The price is fixed, but there is no stipulation as to when payment shall be made. A directs the wood to be piled up in the street in front of his premises. B, having in pursuance of his contract hauled and piled six cords of wood, the wood is levied on by a creditor of A. Can B maintain replevin for the wood as against the officer holding under such levy?

32. Goods are sold and set apart, to be taken by the buyer when he pays for them. Buyer subsequently tenders in payment what purports to be a check of a third party, which he represents to be valid and good for the amount, although he knows that it is forged. Under these circumstances the seller, relying on the buyer's representations, delivers to buyer possession of the property. May seller reclaim the property from the buyer on discovering the facts?

33. A buys from B certain designated animals which are placed by B in a separate pasture, to be taken by A when paid for. A makes part payment at the time, and afterwards, on going to take the animals away, tenders the balance of the price in national bank notes. B refuses to allow A to take the animals assigning no reasons therefor. On a subsequent day, but still within the reasonable time covered by the contract, A comes again for the animals, and without making further tender of the money, takes them away against the objection of B who demands prepayment. B brings an action of replevin. Can he recover the animals?

34. Goods sold on credit, being delivered by the seller to a carrier, and a bill of lading issued to the buyer, or order,

the buyer transfers the bill of lading to a purchaser for value. Subsequently, before the goods reach their destination, the original seller learns of the original buyer's insolvency, and notifies the carrier to stop the goods in transit. Is the last buyer entitled to the goods from the carrier?

35. A retail merchant, knowing that he is rated by the mercantile agencies as worth from ten to fifteen thousand dollars above his debts, and knowing, also, that by reason of debts secured by chattel mortgages on his stock, which are unrecorded and not generally known, he is really insolvent, and that the holders of the chattel mortgages will, when their claims come due, which will be in about thirty days, probably take possession of his property and close him up, orders from a wholesale dealer in Chicago, with whom he has been dealing, a bill of goods amounting to \$1,500, to be paid for in ninety days. The goods thus bought consist of wagons and carriages, some of which are sold by the merchant. In twenty days, however, he makes an assignment for the benefit of his creditors. Can the Chicago merchant recover the goods from the purchasers or from the assignee?

36. Goods being sold by sample, the buyer on their receipt makes no examination, but keeps them for some time, and then finding them not to correspond to the sample, refuses payment, and offers to return the goods. Is the seller entitled to recover the purchase price? In such case, can the buyer, without offering to return, set off, in an action for purchase price, damages due to the goods not being up to the sample? In such case, if the buyer has already paid for the goods, may he recover damages in an independent action, because the goods did not correspond to the sample?

37. A retail candy dealer is sued and damages are recovered against him by reason of illness of a customer caused by deleterious substances in the candy sold by him. It appears in a suit by the retailer against the wholesaler from whom the candy was bought, that the wholesaler bought the

same from a reputable manufacturer, and had no knowledge of any such defect. Can the retailer recover?

38. A, desiring a quantity of copying ink for use in his establishment, orders a quantity of ink from a wholesaler, stating the purpose for which it is desired. Soon afterward a traveling salesman shows him samples of ink, and he orders a quantity to correspond with the sample. Both lots arrive about the same time and remain unopened and untested for three weeks. They are then tried. The first lot is wholly unsuitable for the purpose, and the second lot is inferior to the sample. Has the purchaser any defense, in either case, to an action for the purchase money?

39. A, representing himself to be the owner of one hundred head of cattle in the possession of a herder on a range in a remote part of the state, sold the herd to B for a gross sum, giving B an order on the herder for the delivery of the cattle. B did not at once communicate with the herder, but when a month afterwards he presented the order and demanded possession of the cattle, it appeared that ten of the animals had died between the time when the order was given and the time it was presented. Upon whom would such loss fall? It also appeared that the herder had a lien on the cattle for the herding, prior, as well as subsequent to the date of the order. Would the seller be bound to reimburse the buyer for the amount paid to the herder to extinguish such lien? It also appeared that after the giving of the order and prior to the demand made by the buyer on the herder, the seller had given a chattel mortgage on the animals. Would such mortgage be valid against the buyer?

40. The owner of property, having sold it and set it apart for the purchaser with his assent, a portion of the purchase price being paid, the balance to be paid when the goods are called for, subsequently sells for cash to another purchaser, who has no knowledge of the prior sale, and who also leaves the goods still in the seller's possession. Thereupon, the first buyer comes and pays the balance of the price and takes

the goods. Has the second buyer redress against the seller, or the first buyer?

41. A livery stable keeper, who is also a dealer in horses, sells and delivers to a purchaser a team which has been for some time the property of the liveryman, and kept in his possession. The buyer having driven the team away and used it during the day returns it to the livery stable at night, leaving it there for some time afterwards, to be kept. While the team is thus in the possession of the liveryman for keeping, he makes a sale thereof to another purchaser, who has known of the prior ownership of the liveryman, and does not know of the sale to the first purchaser. Which of the two purchasers is entitled to the property?

42. The owner of a stock of goods makes a secret sale thereof to A, giving to him a bill of sale, but remaining in possession as agent for the prosecution of the business in the buyer's name. While the original owner thus remains in possession, he makes further purchases of B, a dealer, who has no knowledge of the sale to A. B being about to bring action to enforce payment of the debt due him for this purchase, A puts on record his bill of sale, and almost immediately afterwards B brings action against the original owner, and levies an attachment upon the stock of goods. Will this levy take priority over A's bill of sale?

43. The owner of personal property being in financial embarrassment, sells a portion of his personal property for cash, assigns another portion of it to a creditor in payment of a debt to such creditor, and makes a gift of another portion to his wife. A part of his property, however, he still retains, and with that continues in business, not being insolvent at the time the transfers are made. He afterwards becomes insolvent. Which of these transactions, if any, can the creditors have set aside as fraudulent? Will it make any difference whether the creditors seeking to set aside the transactions as fraudulent, were creditors having claims at the time of the

transactions, or whether they were creditors whose claims arose after the transactions took place?

44. A, being the owner of two horses running at large in his pasture, made a sale of them to B, receiving the purchase price and delivering to B the halters, with direction to B to catch them and take them away whenever he saw fit. The next day, one of the horses died, and on the day following A sold the other horse, which was still running in the pasture, to C, who paid for it, but still allowed it to run in the pasture as before. Next day B came for the horses and took away the one which was still alive demanding from A the return of the value of the one which was dead. Can B recover from A the value of the dead horse, and can C recover from B the live horse?

45. A farmer sold to a merchant all the wheat in a certain crib giving a bill of sale therefor, duly acknowledged. Subsequently the farmer gave a chattel mortgage on the same wheat (which still remained in the bin on his premises) to secure a loan from the bank. After the time that the loan was agreed upon and the chattel mortgage executed, and before the money had actually been paid by the bank to the farmer, the merchant put on record his bill of sale. Which has the first claim on the property, the merchant or the bank?

46. The owner of a stock of groceries being hard pressed by his general creditors, makes a sale of his goods in a lump to A for cash at considerably less than the actual value, and puts the money beyond the reach of his creditors. May the creditors have such a sale set aside as fraudulent? Would it make any difference whether the purchaser knew that the creditors were pressing for payment, and sought to assist the seller to put the property beyond their reach?

47. A deposits notes payable to him or order in a bank as collateral security; can the bank bring action thereon in its own name after maturity? One of the notes being returned by the bank to A, in order that he may collect the money for the bank or return the note, can the bank enforce its return

by action? In such case, can the bank sue A for damages, instead of the return of the note, and what would be the measure of its recovery? If A should sell or assign the last mentioned note to B for value without notice of the rights of the bank, but after maturity of the note, would B acquire a better right thereto than the bank?

48. A waiter in a restaurant on closing finds a lady's hand bag, containing a roll of bills, hanging on the hat rack where it has been left by a customer, and gives it to the proprietor of the restaurant to be returned to the owner when called for. No owner appearing, the waiter demands the bag and contents from the proprietor, who refuses to deliver. Can the waiter recover in an action? Would the case be the same if a passenger should find a roll of bills on the floor of a car and deliver to the conductor?

49. The sheriff having levied upon chattel property under a writ of attachment, and the attachment being subsequently dissolved by order of court, the property is destroyed while in the hands of the sheriff by accidental fire. Upon whom does the loss of the property fall?

50. A warehouseman having issued a receipt to one A for property deposited by him in the warehouse for safe keeping (A not being well known to the warehouseman) the receipt is long afterwards brought back by B, who claims to be A, and somewhat resembles A, and is identified as A by having letters addressed to A in his possession. It appears that the warehouse receipt and the letters had been stolen from A without his fault. Can A recover the value of the goods from the warehouseman?

51. A having delivered an old desk to a cabinet maker for repairs, the cabinet maker finds therein a secret drawer containing valuable jewelry. The owner of the desk became possessed of it at auction sale, without knowledge of the secret drawer. The cabinet maker refusing to return the jewelry, the owner of the desk brings action of trover against him. Can he recover? Would it make any difference in such case

if the jewelry had been placed in the secret drawer by the present owner of the desk, and subsequently forgotten? Would the answer to the first part of this question be affected by the fact that the one who owned the desk before its sale at auction, and who had placed the jewelry in the secret drawer had made demand for it from the cabinet maker, having given reasonable proof of his ownership?

52. A delivers to B for use, a chattel of which he has possession and to which he supposes he has title, but it appears afterwards that the person from whom it was purchased by A had procured it by theft. The bailee having satisfied himself fully of the facts refuses to deliver the property to his bailor, but notifies him that it will be held awaiting the claim of the real owner. The bailor brings action of trover. The real owner is inaccessible for the time being, and no demand in his behalf can be made against the bailee. Can the bailor recover the property?

53. Wheat is deposited in an elevator under an agreement between the owner of the wheat and the elevator man that upon demand by the owner the elevator man will return a like quantity and quality of wheat, or pay the market price on such wheat on the date of demand, at his option. The elevator man has on hand at all times a sufficient quantity of the same kind of wheat with which to make the return, but his elevator is destroyed by accidental fire. Will the loss fall upon the elevator man, or the original owner of the wheat?

54. The owner of grain deposited it in an elevator with knowledge of the custom of the elevator man, in accordance with the ordinary methods of the business, of mingling in his bins all grain of the same kind and quality, an ordinary deposit receipt being given for the grain deposited. The elevator man receives other grain of the same kind and quality, which he puts in the same bins, and from such bins, he takes such quantities as may be called for by depositors, or as he may have a right to sell for himself. A creditor of the elevator man subsequently levies upon all the grain in the elevator. Is

the depositor entitled to possession of a like quantity of the same quality of grain as that deposited, the identical grain which he deposited being indistinguishable?

55. A corn buyer having a quantity of corn in cribs ready for sale and shipment, makes a sale of one-half of all the corn he has thus in store. For some time, by mutual agreement of the parties, corn is sold and shipped from the bins, and the proceeds divided equally between them. Subsequently the parties disagree, and the purchaser of the one-half interest, having been refused permission by the seller, on whose premises the corn is stored, to take any part of it away, brings action of replevin against the seller for a quantity of corn equal to one-half that remaining in the bins. May he succeed in such action?

56. Wheat is delivered to a miller to grind, with the agreement that it shall be ground separately from other wheat, and the flour produced delivered to the owner, the bran being retained by the miller as compensation. While the flour made from the wheat is still in the possession of the miller, his creditors levy thereon. Is the owner of the wheat entitled to recover the flour as against such levy? Would it make any difference in such case if the agreement with the miller was to return a certain quantity and quality of flour for each bushel of wheat? What would be the rights of the parties if the wheat which was given the miller to grind, had been stolen, and the original owner had made demand of the miller for the flour?

57. A delivers to a bank cashier for safe keeping, a bag containing certain gold coin, for which a special receipt is given by the cashier. Subsequently robbers enter the bank and carry off the bag of coin with other property. Is the bank liable? Would the bank be liable in such case if the cashier should at night, in collusion with the thieves, open the bank vault and deliver to them the bag of coin? Would the bank be liable if the cashier should deliver the bag of coin on return of the receipt to one who was not the owner, but who

was by him mistakenly supposed to be such owner? Would the liability of the bank be different if the cashier, instead of giving a special receipt for the bag of coin, should enter in the depositor's bank book a credit for the current value of such coin?

58. A team of mares being hired for the year, the animals bear colts during that time. Who is entitled to the colts at the end of the period for which the team was hired?

59. Property having been temporarily loaned gratuitously, is wrongfully taken from the bailee by a stranger. What actions can be maintained against such wrong doer by the bailee and bailor respectively?

60. The bailee of property for safe keeping for a consideration loses it by theft in such manner as does not indicate any negligence on his part. Can the bailee recover from the thief the value of the property, or only the amount of compensation to which he would have been entitled had the property remained in his possession the stipulated time?

61. The finder of a watch, not knowing who is the owner, has it repaired and put in order at some expense (it having been damaged subsequently to being lost and before being found). On demand by the owner for the property, is the finder entitled to possession before such expense is paid?

62. A watch being left with a jeweler for repairs, considerable expense is put upon it by the substitution of new parts for those worn out. Before the watch is entirely ready for re-delivery the jeweler's establishment is broken into by thieves, who steal this watch with others. There being no negligence whatever on the part of the jeweler, and no liability for failure to return the watch, is he entitled to compensation for the labor and expense already put upon the watch at the time of the theft?

63. A farmer who has a standing account with a blacksmith for horse shoeing, on a particular occasion leaves with him a team of horses to be shod. Subsequently calling for the

team, he finds the work not yet completed as to one of them, but is permitted to take the other away. Returning for the one which was left, the blacksmith demands payment of his entire account, including a charge for the shoeing of both the animals last shod, before delivering possession. The farmer tenders the charge for shoeing the horse still in the blacksmith's possession, but refuses to pay the other charges. Can he recover the horse in replevin?

64. A livery stable keeper with whom a horse has been left for keeping refuses to deliver it on demand, claiming that it is a horse that was formerly stolen from him. An action of detinue being brought, the livery stable keeper sets up title in himself and introduces evidence to support his claim, but fails to establish it. The court instructs the jury that even though defendant does not show title in himself, he is entitled to possession until his charges for keeping the animal are paid (there being a statute giving livery stable keepers a lien). Is the charge correct?

65. Cattle being stolen in Johnson County from various owners and delivered by the thief to the railroad company for transportation to Chicago are claimed in Chicago by the respective owners. The railroad company refuses to deliver except on the payment of its charges for transportation. The cattle are worth to the owners as much more in Chicago as in Johnson County as the charge for transportation amounts to. Can the owners recover their animals in replevin, without payment of the freight charges? If the owners in such case sue for the value of their animals, instead of for their possession, will recovery be for the value of the animals where shipped, or for their value in Chicago, or in either case, for their value less the charges of transportation?

66. A requests B as a special favor, to keep A's horse during his absence, agreeing to pay B whatever the reasonable expense of feed for the animal may be. B takes the horse under this arrangement, and puts him with his own horses in a stable which is improperly arranged, so that

cattle have access to the horses. A's horse is injured by being hooked by one of the cattle. Can A recover damages?

67. A gives his watch to B, a neighboring farmer, for repair, B having stated in A's presence that he was formerly a jeweler and watchmaker by trade. Nothing is said about compensation, but B undertakes the service at A's solicitation. As a matter of fact B is not, and never was an ordinarily skillful jeweler or watchmaker, though having some smattering of the trade. In the attempt to repair the watch, B damages it by reason of his want of skill. Is he liable to A? It is to be assumed in answering this question that B uses such care and skill as a prudent person, untrained in the trade, would use.

68. A watchmaker having received A's watch for repair, keeps it in an ordinarily careful manner, but it is stolen by his clerk. Is the watchmaker liable? Would the watchmaker be liable in this case for damages to the watch due to the unanticipated negligence of a workman, usually careful and competent.

69. A, desiring to borrow B's team for a pleasure drive along a certain road which runs near a railroad, and fearing that B will not loan him the team for that purpose lest the animals should be frightened by the train and sustain injury, represents to B that he desires to drive in a different direction, and by means of such representation, secures the loan of the team. He then drives along the road which he originally intended to take, and while thus driving meets a steam threshing machine by which the team is frightened and caused to run away, and the animals are killed. B, not being in fault with reference to the direct cause of the injury, can A recover against him in an action for conversion?

70. A, having loaned to B his wagon, B returns it with one wheel broken. A brings action for damages, proves that the wagon was sound when delivered to B, and injured on its return. In the absence of any evidence on B's part, is A entitled to recover? If, in such case, B introduces evidence

that the wheel broke while he was driving along an ordinary road in a careful manner, with an ordinary load, and there was no cause for the accident which could be foreseen, does he thus make out a good defense?

71. A livery stable keeper having shown by way of defense in an action for failure to return a horse left with him for safe keeping that the horse was stolen by an unknown person, is such evidence sufficient to exonerate him, or must he go further and prove that the care taken to prevent larceny was such as an ordinarily prudent person would deem sufficient?

72. One who has stolen horses in his possession, delivers them to a railroad for transportation to Chicago, taking a bill of lading for the delivery of the horses to himself, or order. He then endorses the bill of lading to a Chicago horse dealer, and attaches it to a sight draft on such dealer for the value of the horses, delivering this draft with the bill of lading attached, to a bank, which advances him money thereon. The horses being intercepted before delivery to the dealer, who does not therefore pay the draft, the bank claims possession of the horses as against the real owner who demands them from the carrier. To which party should delivery be made?

73. Certificates of stock being endorsed by the owner in blank and delivered to his bank as collateral security, are by the bank pledged on its own account for an amount greatly exceeding the amount for which the owner pledged them. Is the owner entitled to recover possession of the certificates from the second pledgee upon satisfying his debts to the bank, without satisfying the claim under which such pledgee holds them?

74. A note being endorsed in blank by the payee, and delivered before maturity to a bank to secure advances, is by the bank, after maturity, delivered to another bank as collateral security for a debt already due, and on which the second

bank is pressing payment, no extension of time, however, being given by the second bank. Action being brought by the second bank on the note against the endorser, may he prove by parol evidence that the delivery to the first bank was as security only, and thereby relieve himself from liability beyond the amount of his debt to the first bank?

75. A, desiring to give security on a note executed to B, states to B orally that the set of Iowa Reports standing on the shelves in A's office shall constitute a pledge for the payment of such note. The books remain undisturbed until levied on by A's creditors, when B seeks to set up as against the levy, a right of possession arising from the pledge. Is B entitled to the books? Would the case have been different had the books been in the possession of another person when A stated to B that the books were delivered to him as a pledge? Would the case be materially different if A had given to B a written order for the books upon the person in whose office they were; and in such case, would it be further important that B had presented such order to the person having possession of the books, who had agreed to hold them for B?

76. A pledgee of a negotiable note holds it until the debt for which it was delivered as security is barred. Pledgor then demands possession of the note which is refused by the pledgee. Can the pledgor recover without paying the debt? While thus held by the pledgee, the note secured has matured, and no demand being made, the endorser on the note is discharged, and it appears that the maker of the note is insolvent. Has pledgor any redress against the pledgee, and would it be material that the endorser who has thus been discharged was also insolvent?

77. If the pledgee of property sells it as his own, what remedy has the pledgor as against the purchaser?

78. If the pledgee after notice to the pledgor sells the security at public sale, and buys it in at such sale for the

amount of the debt secured, what remedy, if any, has the pledgor? Can the pledgor by agreement at the time the pledge is created waive the right to notice?

79. The debt for which the pledge is given as security having become due, what further right, if any, does pledgor have with reference to the pledged property?

80. The owner of a watch, having given it in pledge to secure a debt due by oral contract, the pledgee retains possession of the watch until more than five years after the debt becomes due. He then sells the watch as his own. What remedy, if any, does the pledgor have as against such purchaser?

81. A guest having taken with him to his room at a hotel a very valuable old violin, the instrument disappears without its being possible to account for the cause of its loss. Is the inn keeper liable? Would the inn keeper be liable in such case, if the guest could prove that the loss was due to theft by a servant whom the inn keeper had had every reason to believe honest, or to theft by another guest, or to theft by a stranger? Would the inn keeper be liable for the loss of such instrument by reason of accidental fire?

82. Would it make any difference in the last preceding case that the guest was staying at the hotel under an arrangement for board and lodging by the week at reduced rates, for an indefinite time?

83. A guest having brought with him a stolen horse to the hotel, and having left without paying his bill, can the real owner reclaim the animal from the inn keeper without paying the charges incurred by the thief?

Emlin McClain.

RECOVERY FOR LOSS OF SERVICES FROM WRONGFULLY CAUSING DEATH.

By the common law a cause of action in torts was destroyed by the death of either the person injured or the person responsible for the injury. In other words, such an action did not survive to the personal representative of the person suffering damage or against the estate of the wrong-doer. In accordance with this rule, when a wrongful act caused the instant death of a human being a civil action therefor,—that is for the direct injury, death,—could not be maintained. There was no one qualified to maintain it. It was a tort to the person killed, and like any other tort to him was without remedy by civil suit after his death.

A wrongful act causing personal injuries not serious enough to produce death, yet destroying or impairing the capacity of the person injured to do work, subjected the wrong-doer to liability for the direct injury such as pain, personal disfigurement, etc., as well as for consequential injury, such as expense during sickness and loss of time. If the person suffering the physical hurt was also the person losing the time and expense of sickness, but one action was permitted against the one causing them. But if the services of the person receiving the personal injuries were due to a master or parent, such master or parent was permitted to sue for the damage he suffered in consequence of the loss of such services. The husband was entitled to the services of his wife, and for a like reason he could maintain suit against one who had by wrong impaired the capacity of his wife to render them. Injury to a servant, minor child, or wife, might therefore give rise to two civil actions against one who had wrongfully caused it, one by the master, parent, or husband, for loss of services, the other by or on behalf of the servant, minor or wife, for the direct physical injury. The death of the one losing services ended any action begun therefor, and destroyed any cause of action therefor; the death of the servant, the child or the wife, had

a like effect as to the other; and the death of the wrong-doer also caused the abatement of both. But the right to recover for loss of services remained after the death of the servant, child or wife, and the cause of action in behalf of the servant, minor or wife was not affected by the death of the one entitled to sue for the services. Death subsequent to the injury impairing the capacity to work and from a cause other than the injury, made it impossible to recover justly for loss beyond the time of death. The personal injuries would not be the proximate cause of the death nor of loss to any one entitled to the services of the person thus dying. But if the death of a minor child followed as a result of injuries received by it, reason and the analogies of the common law would suggest a right in the parent to recover damages for services between the injury and the time when the child would have attained majority, the time at which the parent's right to the services ceased. It would also seem that a husband should be allowed to recover against one so injuring his wife as to cause her death for the loss of services for a time equal to her expectancy of life, or for the time, according to the life tables, she would probably have lived had the injury not taken place. For all of such loss would be the proximate consequence of the wrong.

But the precedents deny the right to recover in such cases for the loss of services beyond the time of death, and deny the right to recover at all when the wrongful act or neglect causes instantaneous death. This denial seems to have originated without any basis in reason.¹ Certainly the rule that actions in tort do not survive, is not an obstacle to a parent or husband's right to recover for services lost to him by the instant death of his minor child or wife, nor for services beyond the death of child or wife.

The act causing death might be of such a character as to render the wrong-doer guilty of felony. In an early case² in which the plaintiff sued for damages for assault and battery

¹ See *Sullivan v. Union Pacific R. R. Co.* 3 Dill 384.

² *Higgins v. Butcher*, Yelv. 89.

upon his wife causing her death, Tanfield J., is reported to have said: "If a man beat the servant of J. S., so that he dies of that battery, the master shall not have an action against the other for the battery and loss of services, because the servant dying of the extremity of the battery, it is now become an offense against the crown, being converted into a felony, and that drowns the particular offense and private wrong offered to the master before, and his action is thereby lost." This language seems to mean that when assault and battery results in death, the civil remedy for loss of services is not merely denied until after prosecution for the felony, but that it is gone forever. What was meant, at least subsequently to this case, when merger of civil remedy in felony was spoken of was this, the civil suit for the private injury suffered by an act which amounted to felony was postponed until there had been a conviction or acquittal for the public offense.³ After this criminal charge had been disposed of the suit for damages could be maintained.⁴

This rule was founded in public policy, and made it the first duty of the person injured to prosecute the felon. By postponing civil action until proper efforts were made to secure the punishment of the criminal, all danger that after the private wrong was satisfied there would be a failure to complain of the public offense was removed. This rule did not prevent one whose goods had been stolen from instituting and maintaining trover, before taking steps to procure the punishment of the thief, against an innocent purchaser of the goods.⁵ In such a civil action the reason of the rule failed and hence the rule was inapplicable.

The rule postponing civil remedy until the termination of the criminal proceedings was not an obstacle in the way of a parent's recovery for the loss of the services of a minor child killed instantaneously by the felonious act of another.⁶ In the

³ *Master v. Miller*, 4 T. R. 820, at p. 822 (1791); *Crosby v. Leng*, 12 East, 409 (1810); *Stone v. Marsh*, 6 B. & C. 551 (1827); *White v. Spettigue*, E.C.L.R. 13, 608 (1845); *Boody v. Keating*, 4 Mo. 164 (1836); *Pettingill v. Rideout*, 6 N. H. 454 (1838).

⁴ *Crosby v. Leng*, *supra*.

⁵ *White v. Spettigue*, *supra*, and *Stone v. Marsh*, *supra*.

⁶ *Osborn v. Gillett*, L. R. 8 Ex. 88.

case just cited a father sued for the loss of service of his child, Elizabeth Osborn, and for expenses incurred in her burial. The declaration alleged "that the defendant, by John Broadwater his servant, negligently drove a wagon and horses against the said Elizabeth Osborn, whereby she was wounded and injured, and by reason thereof afterwards died." As a third plea the defendant alleged that the said Elizabeth Osborn was killed on the spot by the act and matters mentioned in the declaration, so that plaintiff did and could not sustain any damage which entitled him to sue in this action for the acts complained of; and as a fourth plea he averred that the acts and matters complained of in the declaration amounted in law to felonious act by the said John Broadwater committed; and that Broadwater, at the commencement of this suit had not, and has not since been tried, convicted, or acquitted of, nor in any manner prosecuted for, the said offense, although nothing ever existed to render such prosecution unnecessary, improper, inexpedient, or to entitle plaintiff to sue in this action without the same having taken place. To these third and fourth pleas there was a demurrer. The fourth plea was held bad by all the barons. Bramwell thought the third plea was also bad. But a majority of the court held it good. This decision was rendered in 1873, about twenty-seven years after the passage of Lord Campbell's Act. The court in holding the fourth plea bad repudiated altogether the view expressed by Tanfield, J., in *Higgins v. Butcher*, that is the reason assigned by him why recovery cannot be allowed for instantly causing the death when the act producing it is a felony. Between the decision of *Higgins v. Butcher* and the decision of *Osborn v. Gillett* there is but one reported case, *Baker v. Bolton*,⁷ decided in 1808, thirty-eight years before Lord Campbell's Act, in which the law applicable to cases of loss of services when the injury causes death was called for. In that case the plaintiff sought to recover from the defendants, proprietors of a stage coach on the top of which plaintiff and his wife were traveling when

⁷ 1 Camp. 498.

the injury complained of occurred. The declaration stated injuries to himself and also that "by means of the premises the plaintiff had wholly lost and been deprived of the comfort, fellowship and assistance" of his wife. The injury occurred by the overturning of the coach, and the declaration showed that plaintiff's wife was so severely injured that she died about a month afterwards. Lord Ellenborough told the jury to take into consideration the bruises which the plaintiff himself had sustained, and also the loss of the society of his wife and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution, saying, according to the report, "In a civil court the death of a human being could not be complained of as an injury; in this case the damages as to plaintiff's wife must stop with the period of her existence." This case was a *nisi prius* case, and there is reason to doubt the accuracy of the report of it.⁸ The decision of the majority of the barons in *Osborn v. Gillett* affirms the doctrine that the death of the person ends all claim for services by the person to whom the services were due and leaves the rule utterly without reason. By this final English exposition of the common law in respect to this question, remedy is denied irrespective of the criminality of the wrongful act. There are American decisions also holding that at common law no civil action could be maintained for loss of services from an act causing death,⁹ and these, too, are decided without disclosing any reason for the origin of the rule. They are rendered by the courts reaching the conclusion that the rule exists and has existed too long to be changed by judicial decision.

What is a husband's or a parent's right in Iowa to damages against one who by wrongfully producing a death has caused such husband or parent loss of services?

"All causes of action survive, and may be brought notwithstanding the death of the person entitled or liable to the same."¹⁰ "The right of civil remedy is not merged in a pub-

⁸ See dissecting opinion of Bramwell in *Osborn v. Gillett*, *supra*.

⁹ *Carey v. Berkshire Railroad Co.* 1 Cush. 475 (1848); *Eden v. L. & F. Railroad Co.* 14 B. Mon. 204 (1858); *Hyatt v. Adams*, 16 Mich. 180 (1867).

¹⁰ Code Sec. 2525.

lic offense, but may, in all cases, be enforced, independent of, and in addition to, the punishment of the latter. When a wrongful act produces death the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts."¹¹ The actions here contemplated "may be brought, or the court, on motion, may allow the action to be continued by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had lived."¹²

"A father, or in case of his death or imprisonment or desertion of his family, the mother, may prosecute as plaintiff an action for the expenses and actual loss of service resulting from the injury or death of a minor child."¹³ These are the provisions of the statutes of Iowa providing for survival of actions, permitting recovery for causing death, and abolishing the common law rule which postponed civil remedy until the prosecution of the public offense when felony was involved.

There is no statute now in force in Iowa expressly changing the common law in respect to a husband's right to recover damages for the loss of the services and society of his wife consequent on personal injuries to her. The wrong to her survives if death does result from the injury. For the survival of such an action the foregoing statutory provisions are plainly sufficient. This is certainly true if she is not instantly killed. It would appear also to be a very narrow construction of the statute to exclude wrongs otherwise actionable because the consequence of their perpetration was the instant death of the one upon whom they were inflicted. The supreme court of the state has decided that the administrator of one instantly killed by the negligence of defendant may maintain suit therefor.¹⁴

¹¹ Id. Sec. 2536.

¹² Id. Sec. 2537.

¹³ Id. Sec. 2556.

¹⁴ *Connors v. B. C. R. & N. Ry. Co.* 71 Iowa, 490; *Worden v. H. & S. Ry. Co.* 72 Id. 301.

We have seen that the husband's right to recover for the loss of the services of his wife between the time of the injury and her death, whether a felonious act caused the death or an act not criminal but negligent, existed at common law after her demise. Therefore the first of the above quoted provisions has not affected the common law right of a husband in this matter.

We have seen that the denial of the right of the husband to recover for loss of services beyond the death of the wife was not an application of the rule postponing civil suits to criminal prosecutions. Therefore the second of the above provisions has wrought no change in the common law right of the husband in respect to recovery in the kind of action we are considering. The effect of instantaneous death upon the right to recover for loss of services of wife or minor child is left as it stood at common law by these provisions. Will the Iowa courts take the view of Bramwell in *Osborn v. Gillett*, and Dillon in *Sullivan v. Union Pacific R. R. Co.*, that there is insufficient reason and authority for the common law rule, and refuse to restrict recovery to the time between the injury and the death, and refuse to deny relief in case the death was instant, when a suit involving the question arises?¹⁵

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¹⁵ See *Mowry v. Chaney*, 48 Iowa, 809.

HYPOTHETICAL CASES IN LAW OF TORTS.

1. Martin Joy deposited \$800 in the First National Bank of Iowa City, Iowa, on the 21st day of July, 1891. On the 24th and 25th of the same month he purchased of several farmers fat steers, paying for them by checks drawn on this deposit. On the 26th of July he drove these cattle to Elmira, a station on the B. C. R. & N. Ry., and put them aboard cars for Chicago. On his way with the cattle to Elmira he stole four steers from one Peter Fortune, and shipped them with the steers purchased. Joy accompanied the cattle to

Chicago, sold them, and on his way from Chicago to Milwaukee, he was killed in a railroad accident July 30, 1891. Fortune has lately learned that Joy stole his steers and was thus killed, and also that the bank aforesaid has \$250 of the deposit made by Joy. Can Fortune now by any civil proceeding secure any part of this money as satisfaction for the loss of his steers? What course must he take?

2. James Grinder is now in jail in Marshalltown, Iowa, awaiting trial on an indictment for stealing a horse about a year ago, belonging to Benjamin Bright, worth \$160. In the same court in which this indictment is for trial Bright has sued Grinder for the value of the horse. Can this civil suit proceed to trial before the indictment is disposed of? Should Grinder be tried, convicted and sentenced for the crime at the next term of the court, and before trial of the civil suit, could Bright proceed thereafter with his suit?

3. Suit on a promissory note was commenced in the proper district court of Iowa by attachment. The defendant set up a counter-claim on the bond for the wrongful and malicious suing out and levy of the attachment. Before trial the plaintiff died and his administrator was substituted as plaintiff. In this suit, after the administrator was made plaintiff, could the defendant recover exemplary damages, provided he could show that the attachment was wrongfully and maliciously sued out?

? 4. A died from the effects of a surgical operation so negligently performed by B, a surgeon, as to make the latter liable to the former in a civil suit. A died the second day after the operation, after suffering intense pain. He was a single man, and his niece and nephew were his nearest relatives. Can his administrator sue and recover a judgment against B? If he can, will anything be allowed as compensation for the pain suffered by A? To whom will the proceeds of the suit be distributed?

? 5. W was injured by being run over by a train of cars on the C. & N. W. Ry. Co., in Tama County, Iowa, rendering

him permanently and wholly unfit to engage in profitable business, under circumstances making the railway company liable. W commenced suit against the company for his injury. His petition in this suit, if sustained by the evidence, entitled him to recover for pain, but before his suit came on for trial he died from his injuries, and his administrator has been substituted as plaintiff. Can the administrator recover anything for the pain suffered by W?

6. S shot and instantly killed the sheriff of M County, Iowa, while the latter was lawfully attempting his arrest. S is now in the penitentiary under life sentence for the murder. It is not yet two years since the shooting. Recently by the death of his grandfather S has inherited property in Iowa. The widow of the sheriff, now in needy circumstances, wishes a legal opinion as to the possibility of recovery for the death of her husband. Can she maintain a suit in her own name therefor? Can she maintain a suit as administratrix by obtaining letters of administration in her husband's estate?

7. The wife of N, while exercising due care, was instantly killed in Cedar Rapids, Iowa, by the servant of G, while within the scope of his employment, negligently driving an omnibus against and over her. She left a husband living. Can suit be maintained by any one against G in consequence of this accident? Who can sue? What will be the measure of damages? *H*

H 8. The three-year-old child of John T and Mary his wife, was killed, while riding with her parents in a carriage driven by her father, by the careless movement of a locomotive and cars on the C. M. & St. P. Ry. Co. The accident occurred at the crossing on one of the streets of Marion, Iowa, under circumstances clearly showing contributory negligence on the part of the father in driving upon the track at the time. The father now proposes to become administrator of the child's estate, and bring suit against the said company for causing the death of his child. Can he maintain such a suit? If recovery is allowed to whom will the damages be distributed, the child

having been the owner of no estate before her death, and having died without debts? Could the father maintain suit in his own name for the loss of services? Why? If he could for what period of time would the value of the services be estimated?

9. The husband of M, at her request, called at defendant's drug store, at Iowa City, Iowa, and requested the clerk in charge to put up a certain quantity of oil of sweet almonds, a harmless medicine. By mistake the clerk gave him the same quantity of oil of bitter almonds, a deadly poison. The husband believing the drug to be what he had ordered, administered it to his wife then confined to her bed by sickness, from the effects of which she died almost immediately. Had the husband exercised ordinary care he would himself have discovered that poison had been given him by the clerk. But there was no negligence on the wife's part. The wife left no children, no debts, and no estate, except the claim for wrongfully causing her death. Her husband married again within four months after her death. An administrator has been appointed and has sued the defendant. The defense is the contributory negligence of the husband and the facts of his subsequent marriage, that no children of the wife survive, and that she left no debts. Are these defenses good?

10. Mary Metcalf, while being conveyed to the hospital for the insane at Independence, Iowa, was instantly killed by an accident due to the carelessness of the servants of the defendant, a railroad. She was a passenger quietly riding with her husband and another in whose custody she was. She was incurably insane at the time, and her malady wholly unfitted her for all kinds of work and employments. What damages could be recovered for her death?

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HYPOTHETICAL CASES IN EQUITY.

[The student is expected to fully investigate the questions involved in the following cases. It is not sufficient that he is able to state the rule in a given case; he must go further. He must so familiarize himself with the principles involved as to be able to intelligently discuss the same, and show their application not only to the particular facts involved, but to analogous cases.

This result can only be obtained by a careful study of the adjudicated cases involving like or similar questions. No cases are cited, as it is the purpose of these hypothetical cases, not only to enable the student to acquire a knowledge of the principles involved, but also that he may have practice in searching for and finding pertinent cases and preparing briefs.

Unless otherwise indicated in the question it is desired that the student be able to state whether or not the facts in the particular case are sufficient to show a cause of action, or whether by reason of any facts stated in the question, the party to be charged has a good defense.]

1. A brings an action in equity, asking that a policy of fire insurance be reformed, alleging that the same was improperly drawn by reason of mutual mistake. Pending the case the property insured burns. Can A recover judgment for the amount of the loss in the same case without a jury trial?

(a) In case A insists upon a jury trial, and the insurance company objects thereto and asks that the damages be assessed by the court of equity, what are the rights of the parties?

2. A, the legal owner of land, devised it to B, who was directed to hold it to the use of C, who in turn was directed to hold it to the use of D. What are the rights of D in the property?

3. A executes a written instrument asserting that he holds lands to which he has the legal title in trust for B, his son. The instrument is duly delivered, but no consideration passed. What are the rights of B?

4. A conveys land to B, conditioned that the same shall not be alienated. What is the effect of the conveyance and the condition?

5. A, orally for a valuable consideration, agreed that he would hold his land in trust for B. Can such trust be sustained under the common law rule?

(a) Can it be sustained under the Code of Iowa?

6. A deposits money in the bank to the account of himself as trustee for his grand-daughter, and informed her and others thereof. He afterwards withdrew the money. What are the rights of the grand-daughter?

7. A orally agrees with B that he will buy in B's property at a tax sale, and hold the same in trust for him, and execute a deed upon demand. A buys in the property and refuses to execute the deed.

(a) Will it change the rights of the parties if B furnishes the money with which A buys in the property?

8. A executes a deed of land to B, a stranger, without any consideration. He afterwards brings an action to recover the property, asserting that B holds the same in trust. Upon whom is the burden of proof, and what amount of evidence is necessary to establish such fact?

(a) Can A testify that it was orally agreed between the parties that B should hold only in trust, under the common law rule?

(b) Is such testimony admissible under the provisions of the Code of Iowa?

(c) Would the rights of the parties, or the burden of proof, or the amount of evidence required be changed, if we assume that B was the son of A?

9. A makes a voluntary settlement of property in favor of his children, designating himself as trustee. Can he revoke the same?

(a) Can he show by parol testimony that there were conditions attached to the grant which did not appear in the deed of conveyance?

10. A makes a trust deed to B conditioned that B shall pay debts of A. Can A revoke the same; if so, at what time and upon what conditions?

11. A deed of trust having been properly executed for the purpose of paying debts, and the debts being all paid, and part of the property still in the hands of the trustees, does the title revert to the original grantor, or is a reconveyance necessary?

12. A, residing in Iowa, makes a trust deed to secure the payment of debt, conditioned that the grantee may sell the same at public auction upon ten days' notice. The grantee advertises the property for sale. What are the rights of A?

13. A, who is solvent, makes an assignment for the benefit of his creditors; is the assignment valid, and what are the rights of the creditors?

14. A makes a deed of assignment for the benefit of creditors, conditioned that the proceeds of the assets shall not be distributed until two years from the date of the assignment. Is the deed and condition valid?

15. Can one member of a firm make an assignment for the benefit of creditors? Discuss.

16. A makes an assignment for the benefit of creditors, in which he provides that B and C, two of the creditors, shall be first paid in full from the proceeds of the property, and that the balance shall be ratably distributed among the other creditors. In the absence of statutory regulations is the assignment valid?

17. A makes an assignment for the benefit of creditors, reserving in the deed the right to the possession and control of the property. Is the assignment valid?

(a) He makes an ordinary assignment, but conditioned that any surplus remaining after payment of debts shall be paid over to the assignor.

(b) The condition attached is that within a certain specified time the creditors shall release the whole debt, or be denied a share in the proceeds of the property assigned.

(c) The assignment authorizes the assignee to sell on credit.

18. A makes an assignment of all his property for the benefit of creditors. One-half the number of creditors consent thereto; the other half file written objections to the assignment, and refuse to accept any benefits thereunder. Is the assignment valid?

19. A makes a devise to B, absolute in form, followed by this clause: "Hoping that the devisee will do what is right as to the disposal thereof between my children."

20. A devises his property to his wife by a clause which standing alone imposed no restraint on her full ownership. By a subsequent clause he made the request that at her death she should devise the same to her daughters, share and share alike. The property being still owned by the devisee at the time of her death, what are the rights of her daughters?

21. A, who desired to convey land to his wife, conveyed it to B, induced by B's oral promise to convey it to A's wife on request. B refuses to convey.

22. A buys real property; the deed recites that the consideration is paid by A. B claims that the money paid by A belonged to him. Can such facts be established by parol?

23. A bought land with money of B, holding the legal title for some years; he then sold the land and with the proceeds thereof bought other land. Can B establish a trust in the land last purchased?

24. A holds a note and mortgage executed to him as trustee. He pledges the same with B as surety for his individual debt. Can B enforce the claim against the pledge, B having no knowledge of the rights of A in the property?

25. A and B, husband and wife, enter into a contract, by which A, the husband, agrees to give to B, his wife, the sum of \$10,000 in one year, at which time it is agreed they shall separate; is the contract binding?

(a) The agreement is that they shall separate at once, the money to be paid in one year. The separation actually takes place; can B enforce the contract?

(b) After the separation within the year, B secures a divorce; can she enforce the contract?

(c) It is agreed in the contract that B shall not commence a suit for divorce. After the year has expired and money has been paid, B commences an action for divorce. What are the rights of the parties?

26. A devises to B \$10,000 to be held in trust for the poor and needy of Chicago; will the trust be enforced?

(a) Would such trust be enforced under the English doctrine of *cy pres*.

(b) Discuss the rule under the decisions of the United States Supreme Court and under the decisions of Iowa.

27. A devises to B \$1000 to be held by him in trust for the Congregational Church of X. There is a Congregational Church at X, but there is no legally incorporated body. Two years after the devise the body becomes incorporated under the laws of the state. Can the trust be enforced? Discuss.

28. A dies intestate leaving as his sole heir his children B, C and D. His property consists of forty acres of land in Johnson county. D has been absent for many years. B and C take possession. Failing to pay the taxes the land is sold at tax sale and purchased by X. Before the time for redemption has expired B buys from X the certificate of sale, and the treasurer executes to B a treasurer's deed for the property.

(a) B buys in an outstanding mortgage executed by his father during his life time for \$500; forecloses the same; sells under execution, and buys in the property and secures a sheriff's deed. What are the rights of the parties?

29. A executes a mortgage to B upon his farm, payable in five years. Subsequent thereto the property was sold for taxes; bought in by X, to whom a treasurer's deed is duly issued, after which A buys said property by warranty deed from X. What are the rights of the mortgagee?

(a) At the tax sale the property is bought in by B, the mortgagee, who secures a treasurer's deed therefor. What are the rights of mortgagor?

30. A commences suit against B upon a promissory note. Pending the action A sells the promissory note to X. What are the rights of X under the common law rule? What rights if any in a court of equity, and what rights under the Code of Iowa?

31. A, a resident of Illinois, injured in a railway wreck, assigns his cause of action to B, a resident of Iowa. The assignment is made in Iowa, and action brought thereon in the courts of Iowa. Can B maintain his action?

(a) Would it change the rights of the parties if the injury was sustained in Iowa?

32. A owes B upon a book account for groceries. B assigns such account to X. After the assignment and before notice to A, A pays B. What are the rights of X?

(a) X notifies A of the assignment; A then pays B. What are the rights of X under the general rule? and what under the statute of Iowa?

(b) After the assignment, and before A has notice, he is garnished in an action against B. Before the garnishee is required to answer, X notifies him of the assignment. A fails to answer, and judgment is rendered against him as a garnishee. Discuss the rights of the parties.

33. A owns a piece of land in Johnson county in which B claims an interest. B is a non-resident of the State, and his place of residence unknown. A brings an action against him to quiet title. Serves notice by publication, and has judgment and decree quieting title as against B. Three years thereafter B returns and brings an action to recover his interest in the property. Is the former judgment a bar?

34. A, a resident of Iowa, in his will devises to his wife \$10,000 in corporate stock, and specifically devises all of his real property, including his wife's dower, to his son B. His wife's dower is of the value of \$1,000. The widow refuses to be bound by the terms of the will, and fails to elect. What are the rights of the parties?

(a) At the time of the death of the husband the widow is insane. The son serves notice upon her of the terms of the will. How may her rights be preserved?

(b) The real property includes the homestead, and the widow resides thereon for ten years, taking no action whatsoever in relation to the will, and having received no portion of the legacy. What are her rights, and what are the rights of her son? Discuss fully the rights of election under the Code of Iowa, and the method of election.

Martin J. Wade.

CASES ON MUNICIPAL CORPORATIONS.

I. THEIR NATURE; CHARTER; CONTROL; HOW GOVERNED.

Definition.

- Cudden v. Eastwick, Salk. 183.
- People v. Morris, 13 Wend. 325 (334).
- Mayor of Nashville v. Ray, 19 Wall. 475.
- Philadelphia v. Fox, 64 Pa. St. 180.
- State v. Leffingwell, 54 Mo. 458.
- Winspear v. Dist. Twp. of Holman, 37 Iowa 542.
- People v. Hurlburt, 24 Mich. 44; 9 Am. Rep. 103.
- Curry v. Dist. Twp. of Sioux City, 62 Iowa 102.

Classification.

- Hamilton Co. v. Mighels, 7 Ohio St. 109.
- Riddle v. Prop. Locks and Canals, 7 Mass. 189; 5 Am. Dec. 35.
- Eastman v. Meredith, 36 N. H. 284; 72 Am. Dec. 302.
- Talbot Co. v. Queen Anne Co. 50 Md. 245.
- Soper v. Henry Co. 28 Iowa 264.
- Ward v. Hartford Co. 12 Conn. 404.

Creation.

- Hope v. Deadwick, 8 Humph. 1; 47 Am. Dec. 597.
- New Boston v. Dunbarton, 12 N. H. 409.
- Gorham v. Springfield, 20 Me. 58.
- State v. Holden, 19 Neb. 249.
- Morford v. Unger, 8 Iowa 82.
- Ewing v. Hoblitzelle, 85 Mo. 64.
- Pidgeon v. McCarthy, 82 Ind. 321.
- Bow v. Allentown, 34 N. H. 351; 69 Am. Dec. 489.

Bassett v. Porter, 4 Cush. 487.
 State v. Leatherman, 38 Ark. 81.
 Austrian v. Guy, 21 Fed. Rep. 500.
 Chicago Pack. etc. Co. v. Chicago, 88 Ill. 221; 30 Am. Rep. 545.
 Brennan v. Weatherford, 53 Tex. 330; 37 Am. Rep. 758.
 Crook v. People, 106 Ill. 237.
 St. Louis v. Shields, 62 Mo. 247.
 Horton v. Mobile School Commrs. 43 Ala. 598.
 Burke v. Jeffries, 20 Iowa 145.
 North Hempstead v. Hempstead, 2 Wend. 109.
 In re Village of Edgewood, 130 Pa. St. 348.
 People v. Detroit, 28 Mich. 228; 15 Am. Rep. 202.

Charter.

North Yarmouth v. Skillings, 45 Me. 133; 71 Am. Dec. 530.
 Clinton v. Cedar Rapids etc. R. Co. 24 Iowa 455.
 Scovill v. Cleveland, 1 Ohio St. 128.
 Sloan v. State, 8 Blackf. 361.
 Eichles v. Evansville St. R. Co. 78 Ind. 261; 41 Am. Rep. 561.
 Kennedy v. Sacramento, 19 Fed. Rep. 580.
 Haywood v. Mayor etc. of Savannah, 12 Ga. 404.
 McGarty v. Deming, 51 Conn. 422.
 Cole v. Jackson Co. 11 Iowa 552.
 State v. Clark, 54 Mo. 17; 14 Am. Rep. 471.

Control by Legislature.

Purdy v. People, 4 Hill 385.
 Holliday v. People, 10 Ill. 216.
 Brighton v. Wilkinson, 2 Allen 27.
 Mayor etc. of Baltimore v. State, 15 Md. 376; 74 Am. Dec. 572.
 Dartmouth College v. Woodward, 4 Wheat. 518.
 Penobscot Boom Co. v. Lamson, 16 Me. 224; 33 Am. Dec. 656.
 Yarmouth v. North Yarmouth, 34 Me. 411; 56 Am. Dec. 666.
 State v. Boone Co. 50 Mo. 317; 11 Am. Rep. 415.
 State v. Hitchcock, 1 Kan. 178; 81 Am. Dec. 503.
 Pell v. Newark, 40 N. J. L. 71; 29 Am. Rep. 266.
 Davis v. Woolnough, 9 Iowa 104.
 Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. Rep. 24.
 Burch v. Hardwicke, 30 Gratt. 34; 32 Am. Rep. 640.
 Lycoming v. Union Co. 15 Pa. St. 166; 53 Am. Dec. 575.
 State v. Tappan, 29 Wis. 664; 9 Am. Rep. 622.
 Mills v. Charlton, 39 Wis. 400; 9 Am. Rep. 578.
 People v. Seymour, 16 Cal. 332; 76 Am. Dec. 521.
 Kunkle v. Franklin, 13 Minn. 127; 97 Am. Dec. 226.
 Mosher v. Independent Sch. Dist. 44 Iowa 122.
 Brieswick v. Brunswick, 51 Ga. 639; 21 Am. Rep. 240.

Corporate Boundaries.

Douglas v. Town of Harrisville, 9 W. Va. 162.

Cutting v. Stone, 7 Vt. 471.
 Hill v. Kahoka, 35 Fed. Rep. 32.
 Albia v. O'Hara, 64 Iowa 297.
 Strosser v. Ft. Wayne, 100 Ind. 443.
 Martin v. Dix, 52 Miss. 53; 24 Am. Rep. 661.
 People v. Bennett, 29 Mich. 451; 18 Am. Rep. 107.
 Granger v. Avery, 64 Me. 292.
 Cold Spring Iron Works v. Tolland, 9 Cush. 492.
 Ashley v. Calliope, 71 Iowa 466.

Governing Bodies.

Richards v. Town of Clarksburg, 30 W. Va. 491.
 Central Bridge Co. v. Lowell, 15 Gray 106.
 Dey v. Jersey City, 19 N. J. Eq. 412.
 State v. Haynes, 72 Mo. 377.
 McCortle v. Bates, 29 Ohio St. 419.
 Heishell v. Mayor etc. of Baltimore, 65 Md. 125; 57 Am. Rep. 308.
 Town of Decorah v. Bullis, 25 Iowa 12.
 Com. v. Arrison, 15 S. & R. 130; 16 Am. Dec. 531.
 Tierney v. Brown, 65 Miss. 563; 7 Am. St. Rep. 679.
 Whitcomb's Case, 120 Mass. 118; 21 Am. Rep. 502.
 Delphi v. Evans, 36 Ind. 90; 10 Am. Rep. 12.
 Spangler v. Jacoby, 14 Ill. 297; 58 Am. Dec. 571.
 Town of Bayard v. Baker, 76 Iowa 220.
 State v. Barbour, 53 Conn. 76; 55 Am. Rep. 65.
 Pond v. Negus, 3 Mass. 230; 3 Am. Dec. 131.

2. POWERS; PROPERTY; COURTS; RECORDS.

Powers in General.

Charleston v. Reed, 27 W. Va. 681, 55 Am. Dec. 336.
 Grand Rapids etc. Co. v. Grand Rapids etc. Co. 33 Fed. Rep. 659.
 Stetson v. Kempton, 13 Mass. 272; 7 Am. Dec. 145.
 Clark v. Davenport, 14 Iowa 494.
 Hanger v. Des Moines, 52 Iowa 193; 35 Am. Rep. 286.
 Bryan v. Page, 51 Tex. 532; 32 Am. Rep. 637.
 St. Louis v. Bell Telephone Co. 96 Mo. 623; 9 Am. St. Rep. 370.
 St. Paul v. Traeger, 25 Minn. 248; 33 Am. Rep. 462.
 State v. Mayor etc. Mobile, 5 Port. 279; 30 Am. Dec. 564.
 Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. Rep. 24.
 Cullen v. Town of Carthage, 103 Ind. 196; 53 Am. Rep. 504.
 Thomson v. Lee Co. 3 Wall. 327.
 Kirkham v. Russell, 76 Va. 956.
 Carron v. Martin, 28 N. J. L. 594; 69 Am. Dec. 584.
 Smith v. Newbern, 70 N. C. 14; 16 Am. Rep. 766.
 Collins v. Hatch, 18 Ohio St. 523; 51 Am. Dec. 465.
 Memphis v. Adams, 9 Heisk. 518; 24 Am. Rep. 331.
 Coldwater v. Tucker, 36 Mich. 475; 24 Am. Rep. 601.

Davis v. Mayor etc. N. Y. 14 N. Y. 506; 67 Am. Dec. 186.
Des Moines Gas Co. v. Des Moines, 44 Iowa 505; 24 Am. Rep. 756.
Malcolm v. Rogers, 5 Cow. 188; 15 Am. Dec. 464.

Particular Powers.

People v. San Francisco, 27 Cal. 655.
Collins v. Welch, 58 Iowa 72; 43 Am. Rep. 111.
Hilbish v. Catherman, 64 Pa. St. 154.
Brodhead v. Milwaukee, 19 Wis. 624; 88 Am. Dec. 711.
Murphy v. Jacksonville, 18 Fla. 318; 43 Am. Rep. 323.
Grant Co. Commrs. v. Bradford, 72 Ind. 455; 37 Am. Rep. 174.
Minot v. Inhab. W. Roxbury, 112 Mass. 1; 17 Am. Rep. 62.
Clark v. South Bend, 85 Ind. 276; 44 Am. Rep. 13.
Tainter v. Worcester, 123 Mass. 311; 25 Am. Rep. 90.
People's Pass. R. Co. v. Memphis R. Co. 10 Wall. 52.
Logan v. Pyne, 43 Iowa 524; 22 Am. Rep. 261.

Corporate Property.

Louisville v. Commonwealth, 1 Duv. 295; 85 Am. Dec. 624.
McCartee v. Orph. Asy. Soc. of N. Y. 9 Cow. 437; 18 Am. Dec. 516.
Eufaula v. McNab, 67 Ala. 588; 42 Am. Rep. 118.
Coggeshall v. Pelton, 7 Johns. Ch. 292; 11 Am. Dec. 471.
Ransom v. Boal, 29 Iowa 68; 4 Am. Rep. 195.
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Brockman v. Creston, 79 Iowa 587.
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Chase v. Merrimack Bank, 19 Pick. 564; 31 Am. Dec. 163.
Meriwether v. Garrett, 102 U. S. 472.
Olney v. Harvey, 50 Ill. 453; 59 Am. Dec. 530.
Middleton Sav. Bk. v. Dubuque, 15 Iowa 394.
Graham v. Carondelet, 33 Mo. 262.
Worden v. New Bedford, 131 Mass. 23; 41 Am. Rep. 185.
Oliver v. Worcester, 102 Mass. 489; 3 Am. Rep. 585.

Municipal Courts.

State v. Young, 3 Kan. 445.
Perkins v. Corbin, 45 Ala. 103; 6 Am. Rep. 698.
State v. Helfrid, 2 N. & McC. 233; 10 Am. Dec. 591.
Shafer v. Mumma, 17 Md. 331; 79 Am. Dec. 656.
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Ketchum v. Buffalo, 14 N. Y. 356.
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Mott v. Hicks, 1 Cow. 513; 13 Am. Dec. 550.
Armstrong Co. v. Clarion Co. 66 Pa. St. 218; 5 Am. Rep. 368.
McDonald v. Mayor etc. of N. Y. 68 N. Y. 23; 23 Am. Rep. 144.
Duncombe v. Ft. Dodge, 38 Iowa 281.
Hobart v. Detroit, 17 Mich. 246; 97 Am. Dec. 185.
Cummings v. Seymour, 79 Ind. 491; 41 Am. Rep. 618.
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Davenport G. L. & C. Co. v. Davenport, 13 Iowa 229.
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Doon Twp. v. Cummins, 142 U. S. 366; 12 Sup. Ct. Rep. 220.
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4. LIABILITY; NEGLIGENCE; BONDS.

Liabilities under Contracts.

Galena v. Corwith, 48 Ill. 423; 95 Am. Dec. 557.
Wes. Sav. Fund Soc. v. Phila. 31 Pa. St. 175; 72 Am. Dec. 730.
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 Rhodes v. Cleveland, 11 Ohio St. 159; 36 Am. Dec. 82.
 Mower v. Leicester, 9 Mass. 247; 6 Am. Dec. 63.
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 Forsyth v. Atlanta, 45 Ga. 152; 12 Am. Rep. 576.
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 Faulkner v. Aurora, 85 Ind. 130; 44 Am. Rep. 1.

Negligence.

Stackhouse v. Lafayette, 26 Ind. 17; 89 Am. Dec. 450.
 Elliott v. Philadelphia, 75 Pa. St. 347; 15 Am. Rep. 591.
 Pittsburg v. Grier, 22 Pa. St. 54.
 Heissenbittel v. N. Y. 30 Fed. Rep. 456.
 Smith v. Philadelphia, 81 Pa. St. 38; 22 Am. Rep. 731.
 Suffolk v. Parker, 79 Va. 660; 52 Am. Rep. 640.
 Barnes v. District of Columbia, 91 U. S. 540.
 Keokuk v. Independent Dist. etc. 53 Iowa 352.
 People v. Albany, 11 Wend. 539.
 Wilson v. Jefferson Co. 13 Iowa 181.
 Fulliam v. Muscatine, 70 Iowa 436.
 Wilson v. White, 71 Ga. 506; 51 Am. Rep. 269.
 Cromarty v. Boston, 127 Mass. 329; 34 Am. Rep. 381.
 Drew v. Sutton, 55 Vt. 586; 45 Am. Rep. 644.
 Riley v. Iowa Falls, 50 N. W. Rep. 33.
 O'Niel v. New Orleans, 30 La. An. 220; 31 Am. Rep. 221.
 Fair v. Philadelphia, 88 Pa. St. 309; 32 Am. Rep. 455.
 Inman v. Tripp, 11 R. I. 520; 23 Am. Rep. 520.
 Thomas v. Boonville, 61 Mo. 282.
 Olsen v. Worcester, 142 Mass. 536.
 Whitefield v. Meridian, 66 Miss. 570; 14 Am. St. Rep. 596.
 Knapp v. Sioux City P. & R. Co. 65 Iowa 91; 54 Am. Rep. 1, (see
 50 Am. Rep. 569, note.)

Bonds.

Anthony v. Jasper Co. 101 U. S. 693.
 Melvin v. Lisenby, 72 Ill. 63; 22 Am. Rep. 141.
 James v. Patten, 6 N. Y. 9; 55 Am. Dec. 376.
 San Antonio v. Mehaffey, 96 U. S. 312.
 Young v. Clarendon Twp. 132 U. S. 340.
 Cook v. U. S. 12 Blatchf. 43.
 U. S. v. Union Pac. R. Co. 91 U. S. 72.
 Diamond v. Lawrence Co. 37 Pa. St. 353; 78 Am. Dec. 429.
 Loan Assoc. v. Topeka, 20 Wall. 655.
 Sharpless v. Mayor etc. of Phila. 21 Pa. St. 147; 59 Am. Dec. 759.
 Portland Sav. Bank v. Evansville, 25 Fed. Rep. 389.
 Jasper Co. v. Ballou, 103 U. S. 745.
 Merchants etc. Bank v. Bergen Co. 115 U. S. 384.

Heine v. Levee Comm. 19 Wall. 655.
 Tyler v. Beacher, 44 Vt. 648; 8 Am. Rep. 398.
 Cromwell v. Sac Co. 94 U. S. 351.

5. DISSOLUTION.

Mobile v. Watson, 116 U. S. 289.
 Olney v. Harvey, 50 Ill. 453; 99 Am. Dec. 530.
 Barkley v. Board of Levee Commrs. 93 U. S. 258.
 Port Gibson v. Moore, 13 S. & M. 157.
 Laird v. De Soto, 22 Fed. Rep. 422.
 Dodge v. People, 113 Ill. 491.

James A. Rohbach.

MISCELLANY.

Appurtenances to Real Property.

The doctrine of appurtenances is being greatly extended in recent cases so as to include as realty, certain things incident to its use which are outside the boundaries of the close. Thus for the purposes of taxation the mains or pipes of water works, or gas works are treated as appurtenant to the lot on which the plant is located, and are taxed with it as real property, although they may extend into another township.¹ So the poles and wires of an electric lighting company are held to be appurtenances of the premises on which the plant is located in such sense that they are covered by a mechanic's lien upon the premises.²

Lightening Liability for Negligence.

In number two of the LAW BULLETIN (p. 58) some cases are cited on the question of the validity of contracts limiting liability for servant's negligence. In a recent case in Iowa it is decided that a contract between a railway company and a person erecting an elevator upon the company's right of way, containing stipulations that the elevator owner shall give his

¹ Appeal of Des Moines Water Co. 48 Iowa, 384; Capital City Gas Light Co. v. Charter Oak Ins. Co. 51 Iowa, 81; Oskaloosa Water Co. v. Board of Equalization (Iowa 1892), 51 N. W. R. 18.

² Badger Lumber Co. v. Marion Water Supply, Electric Light and Power Co. 29 Pac. R. 476; s. c. 30 Pac. R. 117.

business of transportation to the contracting company, and that he shall hold the company "harmless for all damage by fire which in the operation of the [company's] railroad or from cars or engines lawfully on its track may accidentally or negligently be communicated to" such elevator, was against public policy, and void. The court says that a contract which, if effectual, would cause the company to disregard and neglect a duty which it owes to the public cannot be sustained.¹

¹ *Griswold v. Illinois Cent. R. Co.* 58 N. W. R. 235.

Recent Books.

THE PRINCIPLES OF THE AMERICAN LAW OF CONTRACTS AT LAW AND IN EQUITY. By John D. Lawson, B.C. L., LL. D., Professor of Common Law in the University of the State of Missouri, and Author of "Rights, Remedies, and Practice," "The Law of Usages and Customs," "Leading Cases Simplified," etc., etc. St. Louis: The F. H. Thomas Law Book Co., 1893. pp. xxiii, 640.

This book is evidently prepared with primary reference to the needs of law students, although, like other works of that kind it may be found serviceable to practicing lawyers. The everyday rules of the law of contract, as they are generally understood and applied, are here concisely stated and well illustrated. Whatever doubts some teachers of law may have as to the advisability of using a text-book in giving instruction to their classes, there is no doubt that to a large number of law students, in offices and in schools, such a book as this furnishes the best assistance available in acquiring legal knowledge. The preparation of students' books, not mere skeletons of definitions, but containing also illustrations showing the development and application of the rules of law, and yet unincumbered with complicated details, will be of great service to a mass of beginners who have heretofore received little assistance or guidance in their studies. Professor Lawson is to be congratulated on this the first literary fruit of his law professorship.

GENERAL DIGEST OF THE DECISIONS OF THE PRINCIPAL COURTS IN THE UNITED STATES, ENGLAND AND CANADA. Refers to all Reports, Official and Unofficial, first published during the year ending September, 1892. Including the L. R. A., the I. S. Com., and the U. S. Sup. Court Reports, L. Ed. Annual, being Volume VII of the Series. Prepared and Published by The Lawyers' Co-operative Publishing Company, Rochester, N. Y., 1892. pp. viii. 2334, liv.

An annual digest showing in brief form and under convenient arrangement all the published decisions of the courts, is an important book in a practicing lawyer's library, and the volumes of this series seem to be well made. The propositions are well stated and the titles are well chosen. A rough estimate indicates that the number of cases included exceeds twenty thousand.





THE LAW BULLETIN
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PERSONAL TRANSACTIONS OR
COMMUNICATIONS.

Admissibility of, under Code of Iowa, Section 3639.

[No party to any action or proceeding, nor any person interested in the event thereof, nor any person, from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic; against the executor, administrator, heirs-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or guardian shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence].

The purpose of this Section is to prevent the corrupt or dishonest from establishing by testimony of an interested party, claims against estates of deceased persons or lunatics.

The language employed by the legislature is, however, so broad, that nearly every term of the Supreme Court some new question is presented which requires a further consideration and new application of this much construed statute.

Constitutionality.

That the Section is constitutional has been settled by the Supreme Court in the case of *Donald, Administrator vs. Braden, et al.*¹ The court in this case followed the rule adopted in previous cases, which involve the power of the legislature to place a limitation upon the competency of a witness because of his interest in the matter in controversy.²

To what actions the Section applies.

The Statute provides "No party to an action * * * * shall be examined as a witness in regard to any personal transaction or communication * * * * against the executor * * * of such deceased persons, etc.

In *Leasman vs. Nicholson*,³ the word "against" was construed to relate to "examined" and not to "action". In other words it was held that the disqualification existed only when it was sought to establish a fact against the executor, whether the action in which the testimony was offered was one commenced by the executor, or in which the executor was the defendant. If A as next of kin brings an action against B to quiet title to real property, which A claims to have inherited from X, B would be precluded from testifying to an oral contract with X, and the payment of money thereunder, as fully as he would be in a case brought by him against A to recover the property.⁴

In another case,⁵ it was held that the Section applies to an action between heirs. From this decision it necessarily follows that if one heir brings an action against another heir, involving property of the decedent claimed by both, that

¹ 70 Iowa, 551.

² *Karney vs. Palsley*, 13 Iowa, 89. *Black vs. Graves*, 18 Iowa, 312.

³ 59 Iowa, 259.

⁴ *Cochran vs. Breckenridge*, 75 Iowa, 213.

⁵ *Neas, et al. vs. Neas, et al.*, 61 Iowa, 641.

neither party could testify as to any personal transaction or communication with the deceased, nor could any other heir interested in the property be used as a witness by either the plaintiff or the defendant to establish a personal transaction between such witness and party deceased.

In order that a party may rely upon the provisions of this Section to exclude the evidence offered by the other party, it must be shown that he not only is in fact one of the persons designated in the Statute against whom such testimony cannot be introduced, but it must also appear that the action in which the testimony is offered is prosecuted or defended by him as such designated party. For instance, a son files a claim against his father's estate; his sister is introduced by the executor as a witness to establish a personal transaction between the deceased and such witness. She is not precluded from testifying notwithstanding the fact that the witness and the claimant are both heirs at law of the deceased, because the action is commenced by the son, not as heir at law, but as a creditor.¹

A creditor seeking to enforce a judgment against real estate of decedent, cannot, under the provisions of this Section, preclude the heirs at law, or assignees of the deceased person, from testifying to a personal transaction, for the reason that such testimony is only excluded when it is offered "against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person," and a creditor "cannot be designated or described as being any one of these persons."²

In an action against an insurance company the plaintiff and his wife testified in regard to a conversation they had with the soliciting agent of the company, who at the time of the trial was dead. The evidence was objected to for the reason that it was a personal communication between a deceased person and the parties to the suit, the defendant company claiming

¹ Harrow vs. Brown, 76 Iowa, 179.

² Drake vs. Painter, et al, 77 Iowa, 731.

that as to the risk taken by the agent, it came within the term "survivor" as used in the statute; but the Supreme Court held that the testimony was admissible.¹

Who excluded as parties?

That the witness is a party, is sufficient to exclude him even though he has no interest in the action² although if he be but a nominal party, and the actual controversy be between others, such party may be used as a witness.³ And even though the witness was originally a party, the case having been dismissed as to him before he is called upon to testify, he is not incompetent.⁴ But if the person is a necessary party, no matter whether his interests are adverse to those of the party against whom the testimony is offered or not, he is disqualified.⁵

Where an action was brought by an administrator upon a promissory note against the three persons who signed the same, and one of the defendants made a settlement with the administrator by which it was stipulated that a judgment should be rendered against him for a certain amount, such person was used as a witness by his co-defendants, even though judgment had not yet been rendered upon the stipulation.⁶ The stipulation between the plaintiff and the defendant, terminated the claim of the administrator against him, and he was no longer interested in the result of the suit, and was no longer a necessary party.

The true rule as deduced from the opinions of the court construing this Section, seems to be, that a person who is an actual and necessary party to the case, cannot be used as a witness to establish a personal transaction, regardless of whether he is personally interested in the result of the action or not; but if a person is but a nominal party and not a necessary party, he is not disqualified. This construction is reasonable and will carry out the purposes of the statute.

¹ Reynolds vs. Insurance Co., 80 Iowa, 563.

² Williams vs. Barrett, 52 Iowa, 637.

³ Gordon vs. Kennedy, 37 Iowa, 167.

⁴ Campbell vs. Mayes, 38 Iowa, 9.

⁵ Burton vs. Baldwin, 61 Iowa, 283.

⁶ Conger, Adm'r vs. Bean, 58 Iowa, 321.

"Any person interested in the event thereof."

If it appears that the person is interested in the result of the suit or proceeding, regardless of whether he is a party or not, he is disqualified; but the interest which disqualifies, must be legal, certain and immediate.¹ The true test is whether the witness will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action.² If the interest be doubtful or contingent, the existence of such interest may under the ordinary rules of evidence be considered with reference to the credibility of the witness.

In *Goddard vs. Leffingwell*³ the following rule is announced: "Under our statute a person interested in the event of an action wherein an administrator is a party, is not competent to testify in regard to transactions or communications between him and deceased; Code, Sec. 3639. But this evidently means such an interest in the event as would at common law disqualify a witness. Where a witness is equally interested on both sides, such interest will not disqualify. 1 *Greenl. on Ev.*, 420; *Kingsbury vs. Buchanan*, 11 Iowa, 387. In this case the witness, Carter, is equally interested on both sides." Subsequent cases hereafter referred to have, however, changed this rule to some extent.

An heir called to the stand to testify against an administrator of the estate of his deceased ancestor, will be presumed to have an interest in such estate,⁴ and in order to show that he has not such interest as to disqualify him, it is incumbent upon the parties offering such testimony to show that the estate is insolvent, so that in no event would the heir receive any portion thereof, or else show that the interest which the heir did have under the law in the estate, has been disposed of. A mere disclaimer is not sufficient to restore the competency of the witness. It is only by a release or other proper conveyance that he may divest himself of the disqualifying

¹ *Birge vs. Rhinehart*, 36 Iowa, 369.

² *Zerbe vs. Relgart*, 42 Iowa, 220.

³ 40 Iowa, 249.

⁴ *Ivers vs. Ivers*, 6 Iowa, 721.

interest.¹ A gift of property from a parent to a child, cannot be established by the testimony of such child as against the claim of the widow, or administrator of the parent.²

Whether the rule in *Neas vs. Neas*, *supra*, would in such case preclude the widow or administrator from testifying to a personal transaction with the deceased, such testimony being offered against the parties claiming the property as a gift, would depend upon whether the donee would be considered an "assignee" within the meaning of the statute, and this seems to be the construction adopted by the Supreme Court in a late case³ wherein an action was brought by the administrator of an estate against a child of deceased to recover property claimed by said child as a gift, which gift it was contended by the administrator was obtained by undue influence.

In an action brought by an heir against parties holding land under Sheriff's sale upon execution against the ancestor, it was held that the defendants were incompetent to testify to a personal transaction showing the abandonment of the homestead rights in the property.⁴

A stockholder in a corporation is interested in an action for or against such corporation, and for that reason is precluded from testifying as to statements and agreements made by a deceased person in an action against the executor,⁵ and the same rule has been applied to a member of a partnership.⁶ The fact that the witness is interested in any way in the estate under a strict construction of the statute, renders him disqualified, whether in the particular action his interest would be for or against the matter in controversy, and in *Donald, Administrator, vs. Braden, et. al.*,⁷ an action by the administrator to foreclose a mortgage executed to decedent in his life time, it was held that the defendant could not use as a witness the

¹ *Ivers vs. Ivers*, *supra*, 1 Greenleaf Evidence, 426.

² *Muir, Adm'r vs. Miller*, 52 Iowa, 700.

³ *Samson vs. Samson*, 67 Iowa, 253.

⁴ *Baker vs. Jamison*, 73 Iowa, 606.

⁵ *The First National Bank of Burlington vs. Owen, et al.* 52 Iowa, 107.

⁶ *Giesecke, etc. M'fg Co. vs. Seevers*, 52 N. W. R. 555.

⁷ 70 Iowa, 551.

daughter of the intestate by whom it was sought to establish a personal transaction between such witness and the deceased, which would tend to prove the defense pleaded by the mortgagor. It will be seen that in this case, the witness whose testimony was rejected, was interested in increasing the value of the estate and not in decreasing it, because as the estate was increased, her share thereof would be enlarged. Hence her interest, if affecting her testimony at all, would affect it against the interests of the mortgagor, and for the interest of the estate. The Supreme Court places its construction of the statute upon this point upon *Ivers vs. Ivers*, *supra*. In both cases the letter rather than the spirit of the Statute seems to have been adhered to.

In a later case¹ a witness was permitted to testify to a personal transaction between himself and his father, although he was an heir to his father's estate, and the action was commenced by the administrator to recover property belonging to the estate. It is there said "He is not a party nor has he any interest to disqualify him under Code, Section 3639. He is of course an heir and was interested in the division of the property, but not in this suit. Any interest he may have is contingent and uncertain." It is difficult to reconcile this decision with those last above referred to. In *Donald, Administrator, vs. Braden*, the witnesses were not parties to the suit, and were only interested in the estate in so far as the witness, Mrs. Whitmore, would be entitled to a share in the estate upon distribution. Nevertheless, the testimony was excluded, notwithstanding the fact that if admitted it would tend to reduce rather than increase the share to which she would be entitled.

In *Ivers vs. Ivers*, the witness was not a party to the suit, but it was held that she "as heir was directly interested in the result of the suit unless the estate of Martha Ivers was insolvent." And it was held that the court would not presume insolvency of the estate and that therefore the witness was

¹ *Muir, Administrator vs. Miller*, 88 Iowa, 700.

not competent to testify to a personal transaction. The opinion in *Muir vs. Miller* does not refer to the rule announced in the two prior cases, but the effect of the decision seems to be in conflict therewith.

"Personal transaction or communication."

The transaction or communication in regard to which the witness is debarred from testifying, is a transaction or communication which is personal between the *witness* and the deceased person.¹ An interested party may testify as to a personal transaction between a party to the suit and the deceased, and this is true even though the witness is a party to the suit and the evidence is offered in behalf of his co-party.²

The statute excludes not only the testimony of a party, or interested person, and the person from, through, or under whom any such party derives interest or title, but it also excludes the testimony of the husband or wife of such party or person, hence while the wife may not testify as to any personal transactions between herself and deceased where her husband is a party to the proceeding, nevertheless she may testify as to a personal transaction between the deceased and her husband.³ In one case⁴ where in an action by an administrator upon a promissory note, it was sought to show by the testimony of the wife of the defendant that the defendant executed a note as surety, the court held such testimony inadmissible, but subsequently upon a re-trial of the same case, and an appeal to the Supreme Court, the ruling was reversed, and it was held that the wife was a competent witness, for the reason that the transaction to which she testified was not a transaction between herself and the deceased, but between her husband and the deceased.⁵

The testimony of an heir is not incompetent as to conversations which he heard between deceased and defendant, and

¹ *Sypher vs. Savery*, 39 Iowa, 258. *Haverly vs. Alcott*, 57 Iowa, 171.

² *Smith vs. James*, 72 Iowa, 55.

³ *Johnson vs. Johnson*, 52 Iowa, 586. *Samson vs. Samson*, 67 Iowa, 253.

⁴ *Auchampaugh vs. Schmidt*, 72 Iowa, 636.

⁵ 77 Iowa, 13.

in which conversations he took no part.¹ And this is the general rule applied to all persons referred to in the statute.

The term "personal transaction or communication" refers solely to a personal transaction or communication between the deceased or insane person and the witness who is called upon to testify, and the statute has no effect when the witness is called to show personal transactions or communications of any kind between the deceased and others.²

A difficult question sometimes arises as to what is a personal transaction or communication within the meaning of the statute. It is settled as above shown that the communication or transaction must be personal between the witness and the deceased in order to come within the prohibition. The purpose of the statute is, as heretofore indicated, to avoid the establishment of claims without merit against the estate of a deceased person or lunatic. And the spirit of the statute warrants the construction that not only should the witness be precluded from testifying to any direct communication or conversation, but also that he should be prevented from testifying to facts which would give rise to an implied contract or other claim against the estate. The payment of a note³ or the delivery of a deed⁴ by the witness to decedent, cannot be shown by the testimony of such witness.

In an action against an administrator on a note claimed to have been given by decedent to plaintiff for labor performed by plaintiff's wife for deceased, it was held that the testimony of the wife respecting the amount of labor performed by her, was inadmissible.⁵ In an action against an administrator for labor performed by the plaintiff under an oral contract, the witness is not only precluded from testifying to the terms of the contract with the deceased, but he is also prohibited from showing by his own testimony that he performed labor with the knowledge or assent of the deceased so as to give

¹ *Sweezy vs. Collins*, 40 Iowa, 540.

² *Wormley vs. Hamburg*, 46 Iowa, 144. *Lines vs. Lines*, 54 Iowa, 600. *Bank vs. Crevling*, 51 N. W. Rep. 178.

³ *Williams vs. Brown*, 45 Iowa, 102.

⁴ *Wood vs. Brolliar*, 40 Iowa, 591.

⁵ *Ashworth vs. Grubbs*, 47 Iowa, 353.

rise to an implied promise to pay.¹ The kind or character of the work done is held to be a personal transaction² for the reason that such testimony would be a link in the chain of circumstances which would impose a liability on the estate.

In one case where the husband of plaintiff had been employed by the deceased and the deceased in settlement for such services had executed a note to the wife of the employee, it was held that she was incompetent to testify as to what occurred at the time of the settlement.³

In an action by a widow to set aside a deed executed by herself and husband upon the ground of fraud upon the part of her husband and the defendant, she was not permitted to testify as to a representation made by her husband to her in order to induce her to sign the deed.⁴ The testimony it will be observed in this case is offered against the assignee of the deceased.

An attempt to prove that the deceased failed to perform some act as that of payment, is subject to the same objection as if it were sought to show an affirmative action upon his part.⁵ Where it is sought to recover in an action against the husband upon a debt for family necessities, personal transactions between the deceased wife of the defendant and the plaintiff cannot be shown by the testimony of such plaintiff, for the reason that the husband as to such indebtedness is the "survivor" of the wife, and therefore is protected by the statute.⁶ The doing of certain acts in the presence of deceased, unless he takes some part therein, or unless their value as evidence depends upon his presence, are not to be regarded as personal transactions.⁷

In *Conger vs. Bean*⁸ the defendant was permitted to tes-

¹ *Peck vs. McKean*, 45 Iowa, 18. *Smith vs. Johnson*, 45 Iowa, 308. *Wilson vs. Wilson*, 52 Iowa, 44.

² *Cowan vs. Musgrave*, 73 Iowa, 384.

³ *Wilcox vs. Jackson*, 51 Iowa, 308.

⁴ *Palmer vs. Palmer*, 62 Iowa, 204.

⁵ *Van Sandt vs. Cramer*, 60 Iowa, 424.

⁶ *Gavin vs. Bishoff*, 80 Iowa, 606.

⁷ *Daugherty vs. Deeney*, 41 Iowa, 19.

⁸ 58 Iowa, 321.

tify that he signed the note sued on in his own house, no objection being made thereto. He was then asked who was present, and upon objection being made the court held the same admissible as not being a personal transaction, although if objection had been made to the testimony showing where the note was signed, such objection would doubtless have been sustained.

In *Barlow vs. Buckingham*¹ the defendant was permitted to testify to the date upon which the note in suit was executed, although the purpose of such testimony was to change the amount apparently upon the note, and in a late case² it was held that "the statute does not exclude the proof of facts from which by inference other facts may be found." This statement of the law should not be construed to affect the rule announced in *Cowen vs. Musgrave*, *supra*, but should be considered with reference to the facts in the case under consideration.

Knowledge acquired by a witness from letters between the deceased and a party to the suit, cannot be considered a personal transaction between the deceased and the person so acquiring such knowledge.³ And a witness may testify as to the genuineness of the handwriting of the deceased, it being an opinion based upon his knowledge of such handwriting,⁴ although as to whether such witness would be precluded from testifying that he saw the witness sign the instrument, was not decided.

In *Severn vs. Zack* ⁵ it was held that a witness could testify that he observed no difference in the testator's mental condition at the time he made the will and his mental condition prior thereto, when in ordinary health; and it not being necessary that the testator should proclaim or state to the subscribing witnesses to his will, that the instrument is his

¹ 68 Iowa, 189.

² *McElhenny vs. Hendricks*, 82 Iowa, 637.

³ *Gable vs Hainer*, 48 N. W. R. 1024.

⁴ *Sankey vs. Cook*, 82 Iowa, 125.

⁵ 55 Iowa, 28.

will, the subscribing witness thereto, because interested therein is not incompetent to testify as the due execution thereof.¹

"But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, etc., shall be examined on his own behalf; or as to which the testimony of such deceased person or lunatic shall be given in evidence,"

If the administrator, heir-at-law, or other person named be personally examined in relation to a personal transaction between the deceased and the other party to the proceeding, the prohibition of the statute is removed, and the other party or interested person may testify as to the same transaction in rebuttal.² But this clause of the statute has been strictly construed, and in an action by an administrator, the fact that the widow of the intestate goes upon the stand and testifies in relation to personal transactions between the deceased and the defendant, will not enable the defendant to testify in rebuttal as to such fact.³ And where the administrator or other party goes upon the stand and testifies to certain personal transactions the prohibition is only removed as to the specific transaction referred to by such administrator,⁴ and the opposite party is not permitted to testify in reference to other transactions with the decedent.⁵

It is contemplated by the statute that when the administrator or other representative of the deceased testifies as to a personal transaction, then a party may also testify in relation thereto and give his version of the transaction, but he will be limited in his testimony solely to the transaction testified to by the opposite party.⁶ If the administrator testifies to such a transaction as gives rise to an implied promise or obligation upon the part of the defendant, then the defendant is permitted to give his theory as to what the transaction was.⁷

¹ Bates vs. Officer, 70 Iowa, 343.

² Ivers vs. Ivers, 81 Iowa, 721.

³ Canaday vs. Johnson, 49 Iowa, 587.

⁴ Wood vs. Broilard, *supra*.

⁵ Luehrmann vs. Holings, 60 Iowa, 708. Sisters of Visitation vs. Glass, 45 Iowa, 154.

⁶ In re Estate of Edwards, 58 Iowa, 41.

⁷ Bailey vs. Keyes, 52 Iowa, 80.

The reason of the rule which permits the defendant to go upon the stand in rebuttal of the testimony of the administrator would seem to justify the conclusion that when the administrator sought to establish his claim by the testimony of other persons interested in the estate, as in *Canaday vs. Johnson*, *supra*, that the testimony of such interested party as to personal transactions between the deceased and the defendant, should be subject to rebuttal by the testimony of the defendant; but under the strict language of the statute, such construction is not warranted.

If a deposition is taken, which by reason of the interest of one of the parties to the suit, is inadmissible, if subsequent thereto such interested party ceases to be connected with the action by dismissal or otherwise, the deposition may be used,¹ but if the deposition is incompetent when taken, because the witness examined is a party, a subsequent dismissal of the action as to him will not render his testimony competent, the objection being to the competency of the testimony, and not to the competency of the witness.²

The objection should be urged to the testimony when the question is propounded to the witness, or in case its personal nature is not developed until the witness has answered; a motion to strike out the answer should then be made.

A person "from, through, or under whom any such party or interested person derives any interest, or title, by assignment or otherwise," is subject to the same prohibition as is the party to the suit. If A owns an account against B, and after the death of B sells the same to X, A as well as X is precluded from testifying to a personal transaction with B in an action upon the account against his estate.

It has been held that the term "next of kin," as used in the statute, must be construed to include persons other than those of relationship by blood or consanguinity; that the purpose of the statute can only be fully carried out by including within

¹ *Campbell vs. Mayes*, 38 Iowa, 9.

² *Burton vs. Baldwin*, 61 Iowa, 283.

that term relatives by marriage who are entitled by law to a distributive share in the estate, and it was held that the wife of decedent was included within the term.¹

New questions are constantly arising which require a careful consideration of this section of the statute, and in the absence of a construction already placed thereon by the Supreme Court, the purpose of the statute should be the guide in ascertaining its application.

Martin J. Wade.

¹ French vs. French, 51 N. W. R. 145.

THE ESSENTIALS OF CRIME.

There are certain elements which exist in almost every set of facts constituting a crime. If these are wanting, no crime is committed. Generally the basis of criminality is in the will. The law does not recognize a mere wish. If it did, it could not discover the will. One man may be prejudiced against another, and wish to injure him, and express this wish to others, but the law takes no notice of his wish or thought; but as soon as he performs some act, or even if he purposes to commit the act at a time which he may deem suitable, he has passed beyond the wish to intention, which may be defined as "thinking upon an act as one that will be performed when a suitable time comes." The will then is fully exercised when the act is performed in pursuance of the intent. The existence of the intention and the exercise of the will are necessary ingredients of crime. Unless uttered aloud the intent cannot be discovered in the absence of some act. The will executes the intent in the act, it gives to action intention, both may generally be seen in the act. In some acts we may find either or both absent; both, where one who in running away from inevitable death, overturns a plank, which falling upon another inflicts an injury from which he dies; and intent in the case of an infant. The intention, to constitute criminality, must necessarily be a state of mind forbidden by law. "The

act itself does not make a man guilty unless his intention were so," and "an act done by me against my will is not my act." Where the law prohibits the act, it is illegal to do the act, certainly wilfully, and in some cases ignorantly. Wherever a violation of law occurs, the presumption is that it was intentional, and the legal maxim of *ignorantia juris non excusat* applies generally. The stranger in the land, as well as the native, is bound by it. Where one mistakes the law, and carries away property which he believes himself entitled to, he may show his ignorance of the law as a part of his defense, and if the evil intent to steal be lacking, he is not guilty of larceny. Very different is the doctrine as applied to ignorance of fact. If without carelessness or negligence, or overlooking a duty imposed upon him, he mistakes the facts, he may offer the same as a matter of defense. Intent being the essence of crime, where one is misled by facts without any fault of his own, he is innocent. While the criminal law does not punish an intention, except in case of treason, yet it does punish an attempt. Thus it has been held in some states that if on the trial of any indictment, it shall appear that the offence charged was not completed, the jury may convict of the attempt. Wharton defines an attempt to be "such an intentional preparatory act as will apparently result, unless extrinsically hindered, in a crime which it was designed to effect." In the attempt, as well as in the completed crime, the intention and the act must concur. Preparations are not attempts. The preparations must be put in such shape that they will produce the consequences in question, in the usual course of events, to be punishable.

Behind the intent we find frequently *Motive*. It is this which excites or stimulates the mind to action, and is of value as showing what is the intent, or at least throwing light upon the intent. While it frequently does exist, it by no means always precedes the intent or act. Neither is the motive always proportionate to the wickedness of the crime. For example, the motive may be to steal, but the result of the act may be homicide.

Malice is known as the guilty intention or criminal state of mind, and it must be proved affirmatively either by direct proof or such a state of facts as will warrant its inference. But when the law expressly declares an act to be criminal the question of criminal intention or malice need not be considered in proving the case. It might be said that it practically may be regarded as synonymous with criminal intention. A depraved, wicked heart, regardless of social duty, and bent on mischief, as well as special malevolence, is held to be included within the term malice. Where one does wilfully that which he knows will injure another in person or property, we call it malice. And we define it to be either (1) *Specific*, where the means is intentionally used to effect a single purpose, and it is immaterial whether the means will effect the object with certainty or not; thus A strikes at B and injures C, the particular criminal intent against B makes the maiming of C a crime. (2) *General*, where the means selected may have two or more effects, of which he is aware; thus A shoots at a dog in a crowded street, here malice exists, but it is indirect malice, the means is aimed at the dog, but the final intent is general, he is disregarding of whom or what he may hit. (3) *Express*, where from the preceding circumstances or the threats it is proved; thus A quarrels with B, and threatens to kill him, and subsequently he carries out his threat. Here we find the willful act, the completion of the criminal intent or malice. (4) *Implied*, when from the facts surrounding and connected with the act the inference of malice is warranted. And in the absence of proof of excuse or justification, we infer a prior intention. In malice we find *premeditation*, and it is in some states made a condition to certain crimes. There is no duration of time which can be fixed at law as a measure of premeditation. It is not necessary to prove time. The facts existing which show a specific intent prior to the deed, the finding of premeditated malice is warranted. If there is a general evil intent, and evil is done, and the wrong resulting is one that was a probable result of the evil, the party having the general intent is to be regarded as having the specific one.

Malice is always, however, a question of fact, and never to be ruled as a question of law.

Another element of crime is *Fraud*. This is closely connected with malice, and its constituent elements are "deceit, or an intention to deceive, or sometimes mere secrecy, and either injury or possible injury or an intent to expose some one to either by means of that secrecy or deceit." Here we find the motive to be personal advantage and the means to that end is the deceit or secrecy. But generally wherever fraud is an element of the crime, it is really a part of the criminal intent.

Again we find in crime another element, *Negligence*, which we may regard as the very opposite of malice. This term means carelessness, heedlessness, being disregarding of matters which directly pertain to the acts engaged in, being such matters that ought and might have been noticed. It has, however, a much wider scope, thus in criminal law it means, also, an omission to discharge a duty imposed by law. In cases coming under the last division, an indictment will lie for the non-performance of the imposed duty, or if the duty be performed negligently the same course may be pursued. Generally, to impute negligence, it must be the *misconduct* of the person charged, and must stand in casual relation with the negligent act. If negligence on the part of A produces the same in B, and an injury happens from the latter's negligence, A cannot be held responsible, and this is true even if his negligence induces another to perform a criminal act, or to injure himself. But if he purposely puts another in a position to do a negligent act, he may be held responsible, because there may be malicious accessories to negligent acts. If there be compulsion, there can be no crime, rather every crime to be punishable must be the voluntary act of the person, free from compulsion. "No action can be criminal if it is not possible for a man to do otherwise. An unavoidable crime is a contradiction, whatever is unavoidable is no crime, and whatever is not a crime is unavoidable." (Bishop, *Crim. Law*, Vol. I, § 346, 2.)

We find that to constitute a crime, there must be the *internal will*, the *external act* and the *casual relation* of the will to the act. The act without the will or intent is not a crime, nor is the intent without the act a crime. The intent is only discovered by the act or the attempt to act, and the act may or may not be a crime, depending upon the existence or absence of intent.

James A. Rohbach.

HYPOTHETICAL CASES IN THE LAW OF PARTNERSHIP.

1. The time at which by the articles of co-partnership between A and B the firm should be dissolved had arrived. Before any agreement between them as to who should have charge of the business in winding up the firm's affairs, B sold his interest to C. A continued in possession of the firm property and books. The proper expenses in converting stock into money, paying debts, collecting claims, etc., were one thousand dollars in excess of the profits of the business since the sale by B. How should this loss be treated when C and A settle the account?

2. All the property of a firm consisting of E, F and G, including cash and credits, amounted to \$16,000. The firm debts amounted to \$7,300. To completely close up the business will cost probably \$400. E had contributed to the firm \$2,000 capital, and was not indebted to the co-partnership; F had contributed to the firm \$1,500, and owes the co-partnership \$700; G had contributed to the firm \$800, and had advanced the co-partnership \$250, during its continuance, over and above all he had drawn out. What are the values of the respective interests of E, F and G, the presumption being that they shared profits equally?

3. J and T formed a partnership to conduct the business of keeping a hotel for five years, J renting to the firm the

hotel property in which prior thereto he had conducted a similar business alone. At the end of the five years they had no firm debts and all the profits had been divided on the basis that each was entitled to one-half. T had withdrawn \$300 from the firm more than his portion of the profits. No other claim of the firm existed. Could J maintain an action at law for his portion of this \$300?

4. M and N were equal partners. Under the insolvent laws of the state wherein their business was conducted they made an assignment as partners of all their firm property for the benefit of their creditors. Besides his interest in the firm M had no property exempt from execution. N was solvent. The assigned property was insufficient to pay all the creditors of the co-partnership and the expenses of the assignment. The separate creditors of M filed claims with the assignee for payment to the amount of \$350; and the separate creditors of N filed claims with the assignee for payment to the amount of \$400. Discuss the rights of these several classes of creditors to share in the assets in the assignee's hands.

5. C and B were partners engaged in the retail grocery business. About half past one o'clock at night B, having no key by which to enter the store, broke open a window, then entering through the window, unfastened from the inside the cellar door and removed from the stock three barrels of sugar and conveyed them to his own dwelling, his partner in no way consenting, and being wholly ignorant of his intention to do this. Is B guilty of any crime? Why? Can C maintain replevin for the sugar?

6. A co-partnership composed of R and W brought suit in the district court of Clayton county, Iowa, in the firm name against P. P pleaded as a counter claim a debt owed him by W. Was this a good counter claim in this action? Why?

7. M and R, partners, to secure a debt of M to one G gave a chattel mortgage on their stock. G was at the time about to sue on the debt. The firm was clearly solvent at the time. Two days after the recording of the mortgage

attachment suits were commenced against the firm by five creditors and the sheriff seized the stock under the writs of attachment. The mortgagee, G, intervened in each attachment suit, claiming that his mortgage was the prior lien. Who had the prior right upon the stock?

8. B, a member of a partnership, assigned all his interest to his partner D in consideration of the latter's promise to pay the indebtedness of the firm and \$2,000 in cash. B entered into partnership with K in a new business and D formed a partnership with F into which he put the stock of goods before belonging to the partnership of himself and B. B contributed to his firm substantially all his means. Between three and four months after these changes D died. Debts of the firm first mentioned exist and the firm composed of D and F has a large amount of debts. Discuss the rights of the creditors of the firm of B and D to resort to the assets of the firm of which D was a member at the time of his death. If D and F were equal partners and the firm property exceeded the debts and expenses of closing up by \$800, how much of this excess could these creditors or any of them claim? Would these creditors have claims good against the estate of D? Could they participate equally with the individual creditors of D in his estate if the estate was insufficient to pay all? Is B's interest in the partnership between him and K liable to the claims of these creditors?

9. B and S formed a partnership and purchased a stock of dry goods. Each put into the business \$8,000. B borrowed \$5,000 of his capital from H. Eighteen months thereafter, being unable to pay their overdue debts, they made an assignment of all their firm property for the payment of all the debts of the firm. At the time of the assignment B was still owing \$2,500 of his debt to H. H filed his claim with the assignee. S objected in proper form to the allowance of this claim, and it has not been paid. The assignee has paid all the firm indebtedness, and after reserving enough of the funds to pay all costs and expenses of the assignment, has \$3,000 surplus. How much, if any, of this ought to be paid to S?

10. P, S and G, were partners in a manufacturing business. P owned one-fourth of the business; S owned one-fourth, and G owned the other one-half. P and S were in charge of the business in pursuance of the articles of co-partnership. On January 3, 1892, P mortgaged his interest to L, to secure his individual debt to L. In October following S gave a mortgage on all of his interest to J, to secure his individual debt. Three days thereafter J sold and assigned his debt and mortgage to L, and with the consent of P and S, L the next day took possession of the partnership property for the purpose of foreclosure. A creditor of the firm has brought an action against the co-partners, and has attached the property. L wishes a legal opinion as to his rights. What can he demand in respect to the stock attached?

11. L and M, co-partners, satisfied that their business was not prosperous, agreed to dissolve, and thereupon L agreed that M should take the firm property, including cash and book accounts and other claims of the firm, close up the business, and pay the firm debts; and promised to pay his portion of any residue of indebtedness after the firm property was applied thereon. M asked L to give him a mortgage on his interest to secure this promise. Would the mortgage increase M's security?

12. T, F and S formed a co-partnership, and established a starch factory. At the end of two years S withdrew, selling his interest to T and F, who continued the business as co-partners. Thereafter P became indebted to the new firm for starch purchased. W, a creditor, obtained a judgment against the old firm of T, F and S, and levied an execution by garnishing P. In his answer as garnishee P has disclosed the fact that his debt is to T and F. Is P liable in the garnishment?

13. A, a partner, sold his interest to his co-partner, taking a contract from him that the debts of the firm should be paid from the property belonging to the partnership at the time of the sale. The purchaser has paid no debts, and is about to

sell the stock in bulk. Can A legally compel the application of the property to the payment of the co-partnership debts?

14. A, a member of the firm of A and C, died. His partner, C, took charge of the firm property and business. The administrator of A collected from H, a debtor of the firm, the full amount of the debt, and gave as administrator a receipt to H. Is H released from liability on this debt?

15. The administrator of K who was a partner with N at the time of his death is in possession of seventeen steers, the property of the firm. Can N sell these steers and thereby give the purchaser the right to take them from the administrator?

16. M, the surviving member of a firm consisting of himself and C, has closed up the firm business and paid all the debts. He has funds derived from the business to the amount of \$15,000. The articles provide that the profits of the business shall be shared equally, but say nothing about losses. M's capital in the firm was \$8,000, and C's was \$5,000. How much can the administrator legally claim of the \$15,000?

17. K and L formed a co-partnership and engaged in the business of manufacturing and selling plows. K contributed all the capital, to-wit, \$10,000, and both gave their entire time to the business. During the existence of the firm the partners made several settlements on the basis that each was entitled to one-half the net profits. The contract was entirely silent on the subject of profits and losses. After disposing of all the firm property and paying all the firm debts there is a fund of \$600. Does L owe K anything on the partnership account?

18. In an action now pending in the District Court of Cedar County, Iowa, plaintiff's petition claims the sum of \$400 from the defendant as plaintiff's portion of money collected by defendant and discloses by its averments that a partnership had previously existed between plaintiff and defendant, debts of which were still unpaid and that defendant had collected since the dissolution on the partnership accounts

existing at the close of the firm business, \$800, the one-half of which plaintiff claims. Will a demurrer to this petition be good?

19. At the death of C, of the firm of C and H, there is a credit to the firm on the deposit account of the First National Bank of P, of \$5,000. H draws a check against that balance payable to the order of K, a creditor of the firm, in payment of his claim, signing it with the firm name. Can the bank legally pay it?

20. B and F, co-partners, dissolved their firm. P brought an action against them as partners after such dissolution. F employed an attorney to defend, without the consent of B. Was F's contract with the attorney binding upon B?

21. At the time of the dissolution of a co-partnership, the statute of limitation was a complete bar to an action on a firm debt, a promissory note. A few days after the dissolution one of the partners acknowledged the existence of the debt in writing signed with the firm name. Did this revive the debt against the other partner?

22. Within a few days after the dissolution one of the partners sold a promissory note made payable to the order of the firm and assigned the same "without recourse" in the name of the firm. Was the assignee's title good?

23. K and T had been partners. Their firm was dissolved by K selling his interest to P. Before the affairs of the firm were fully settled T died. Who thereafter had authority to take charge of the unsettled business and the remaining property of the firm?

24. B was a dormant partner in the dry goods trade with W. W died. Who could sue for the debts due the firm?

25. J, the sole surviving partner of J & Co., has brought suit against a debtor of the firm. The defendant is a creditor of J, by virtue of a transaction wholly independent of the partnership. Can the defendant plead the debt from J to him as a counter-claim?

26. In an answer to an advertisement of the city of W for bids for macadamizing specified parts of several of its streets, B put in proposals. Thereafter the contract was awarded to B by the city authorities. B then made N, the owner of a stonequarry within convenient distance of the streets to be macadamized, acquainted with the terms of the contract and the compensation agreed to be paid by the city. Thereupon it was agreed between them that N should furnish at his quarry the stone necessary to do the work and in consideration therefor should receive the one-third of the price to be paid by the city, less one-half the expense of the labor of hauling and crushing the stone, and placing it in the street as required by the city under its contract with B. B then purchased a steam crushing machine for crushing the stone, paying part cash therefor and obtaining credit for part of the price. This machine was used, the work done, accepted and paid for. N has received his pay in pursuance of the agreement between him and B. But there is a balance due on the stone crushing machine. Is N liable therefor? Was he a partner with B?

27. The exclusive sale at not less than \$300 per acre of a tract of land was given by A, the owner, to B on these terms: B was to plat it as A's addition to the town of W. T., to offer it for sale, to thoroughly advertise it and press its sale at his own expense. All the profits arising over and above \$300 per acre were to be divided equally between A and B. Did this make A and B partners?

28. C, with a stock of merchandise worth \$10,000, and H, with a stock worth \$5,000, combined their goods, and opened at the city of Y a new store under this agreement: C was to be owner of two-thirds of the stock at all times. H was to take charge of the business and maintain the stock, at \$15,000 value. If H failed to keep up the stock to this value C might take possession and sell the same. At the end of three years the profits of the business were to be divided equally, and C was to be allowed either to withdraw stock to

the value of his original contribution, or continue the business without change for two years more at his option. And they stipulated that they did not intend to become partners by this agreement. Six months after the commencement of the new business H purchased of a St. Louis house \$3,000 worth of goods for the business. The St. Louis house has not been paid. Can it hold C as a partner?

29. B and G, partners, made an assignment for the benefit of all their joint and individual creditors to M, of all their joint property, and all their separate property not exempt. The only firm property owned by them was some worthless book accounts. B's private estate assigned is worth \$8,000. C, an individual creditor of B, wishes to know whether it would be wise for him to buy these accounts for say \$50, and thus create a joint fund. He has ascertained that G's separate property is insufficient to pay his individual creditors, and that there are about \$7,000 due partnership creditors. His own claim will be paid in full, provided he and the other individual creditors of B are given the preference as to the separate fund arising from the separate property of B. It is a claim of \$900. What do you say as to the wisdom of C buying the accounts?

Samuel Hayes.

CASES ON THE LAW OF PARTNERSHIP.

I. PARTNER'S INTEREST.

- Tappan v. Blaisdell, 5 N. H. 190.
- Douglas v. Winslow, 20 Me. 89.
- Price v. Jackson, 6 Mass. 242.
- Schalck v. Harmon, 6 Minn. 265.
- Simpson v. Leach, 86 Ill. 236.
- Lambert v. Griffith, 50 Mich. 236.
- Jones v. Parsons, 25 Cal. 100.
- Beecher v. Stevens, 43 Conn. 587.
- Mayer v. Garber, 53 Iowa, 689.
- Commercial Bank v. Mitchell, 58 Cal. 42.

2. CONVERSION OF JOINT INTO SEPARATE PROPERTY.

- Ruffin, *ex parte*, 6 Ves. 119.

Wilcox v. Kellogg, 11 Ohio, 394.
White v. Parish, 20 Tex. 689.
Gwin v. Sedley, 5 Ohio St. 96.
Sigler v. Knox Co. Bank, 8 Ohio St. 511.
Robb v. Mudge, 14 Gray, 534.
Allen v. Center Valley Co. 21 Conn. 130.
Schmidlapp v. Carrie, 55 Miss. 597.
Weaver v. Ashcroft, 50 Tex. 428.
Locke v. Lewis, 124 Mass. 1.
Rice v. Barnard, 20 Vt. 479.
Jewell v. Meech, 101 Ind. 289.
Saunders v. Reilly, 105 N. Y. 12.
Woodmansie v. Holcomb, 34 Kans. 35.
Reeves v. Ayers, 38 Ill. 419.

3. PARTNER'S LIEN.

People v. Till, 3 Neb. 261.
Lane v. Jones, 9 Lea (Tenn.), 627.
Pierce v. Wilson, 2 Iowa, 20.
Glynn v. Phetteplace, 26 Mich. 383.
Meridan Nat. Bank v. Brandt, 51 Ind. 56.
Moore v. Steele, 67 Tex. 435.
Miller v. Estill, 5 Ohio St. 508.
Vasper v. Kramer, 31 N. J. Eq. 420.

4. PARTNER'S LIEN LOST BY SALE TO CO-PARTNER.

Seaman v. Huffaker, 21 Kans. 254.
City of Maquoketa v. Willey, 35 Iowa, 323.
Ladd v. Griswold, 9 Ill. 25.
Trentman v. Swartzell, 85 Ind. 443.
Dimon v. Hazard, 32 N. Y. 65.
Baker's Appeal, 21 Pa. 76.
Goembel v. Arnett, 100 Ill. 34.

5. EXECUTOR OF DECEASED PARTNER CAN ENFORCE LIEN.

Allen v. Second National Bank, 6 Lea (Tenn.), 558.
Watkins v. Fakes, 5 Heisk. 185.
Fletcher v. Vandusen, 52 Iowa, 448.
Williams v. Love, 2 Head, 80.
Giddings v. Palmer, 107 Mass. 269.

6. PRIORITY OF FIRM CREDITORS IN RESPECT TO FIRM FUNDS.

Kirby v. Schoonmaker, 3 Barb. 46; S. C. 49 Am. Dec. 160.
McCulloh v. Dashiell, 1 Har. & G. 96; S. C. 18 Am. Dec. 271.
Gordon v. Kennedy, 38 Iowa, 167.
Gadsden v. Carson, 9 Rich. Eq. 252; S. C. 70 Am. Dec. 207.
Ladd v. Griswold, 4 Gilm. 25; S. C. 46 Am. Dec. 443.

Blankenship v. Wartelsky, 6 So. W. R. 140.
 Powers v. Large, 69 Wis. 621; S. C. reported as Powers v.
 Powers, 35 N. W. R. 53.
 Richards v. Allen, 117 Pa. 199; S. C. 11 Am. R. 552.
 Switzer v. Smith, 35 Iowa, 269.
 Fullam & Co. v. Abrahams, 29 Kans. 725.
 Shackelford v. Clark, 78 Mo. 491.
 Gillaspy v. Peck, 46 Iowa, 461.

7. RIGHTS OF CREDITORS OF SUCCESSIVE FIRMS.

Scully v. Allen, 16 N. J. L. 147.
 Hoyt v. Sprague, 103 U. S. 613.
 Richardson v. Tobey, 3 Allen, 81.
 Ackley v. Winkelmeyer, 56 Mo. 562.
 Hart v. Tomlinson, 2 Vt. 101.
 Meyberg v. Steagall, 51 Tex. 351.
 Locke v. Hall, 9 Me. 133.
 See Hulburt v. Johnson, 74 Ill. 64.

8. PARTNERS PRESUMED TO HAVE EQUAL SHARES.

Peacock v. Peacock, 16 Ves. 49.
 Roach v. Perry, 16 Ill. 37.
 Farr v. Johnson, 25 Ill. 522.
 Northrup v. McGill, 27 Mich. 234.
 Henry v. Bassett, 75 Mo. 89.
 Griggs v. Clark, 23 Cal. 427.
 Moore v. Bare, 11 Iowa, 198.

9. REPAYMENT OF CAPITAL BEFORE DIVISION OF PROFITS.

Livingston v. Blanchard, 130 Mass. 341.
 Lord v. Anderson, 16 Kans. 185.
 Jackson v. Clapp, 32 Ind. 422.
 Whitcomb v. Converse, 119 Mass. 38.
 Raymond v. Putnam, 44 N. H. 160.
 Hanks v. Barber, 53 Ill. 292.
 Taft v. Schwamb, 80 Ill. 289.
 White v. Bullock, 18 Mo. 16.
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Samuel Hayes.

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Emlin McClain.

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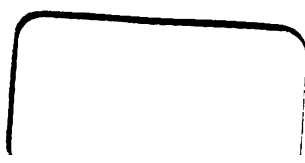
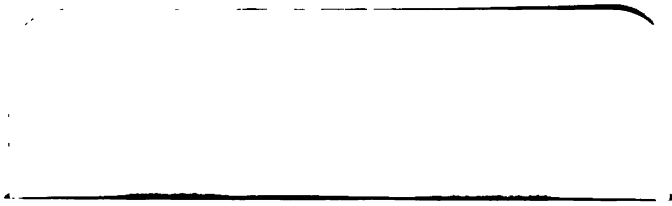
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